EXECUTIVE SUMMARIES

Philadelphia Bar Association
Chicago Bar Association
Bar Association of San Francisco
Pennsylvania Bar Association
Allegheny County Bar Association
Montgomery County Bar Association

Proposed Amendments to the Constitution and Bylaws

Section of Legal Education and Admissions to the Bar

Standing Committee on Paralegals

National Conference of Federal Trial Judges
Judicial Division
Appellate Judges Conference
National Conference of State Trial Judges
National Conference of Specialized Court Judges
National Conference of the Administrative Law Judiciary
Tort Trial and Insurance Practice Section

Standing Committee on Election Law

Section of State and Local Government Law

Standing Committee on Legal Aid and Indigent Defendants
Commission on Homelessness and Poverty
Commission on Interest on Lawyers Trust Accounts
National Legal Aid and Defender Association

Bruce Wilder, ABA Member

Standing Committee on Lawyer Referral and Information Service
Association of the Bar of the City of New York
Austin Bar Association
Brooklyn Bar Association
Cincinnati Bar Association
Law Practice Division
Oregon State Bar
Section of Civil Rights and Social Justice
Standing Committee on Disaster Response and Preparedness
Standing Committee on Group and Prepaid Legal Services
The Bar Association of San Francisco
New York State Bar Association

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RESOLUTION

RESOLVED, That the American Bar Association reaffirms its support of lawyer referral services sponsored by state, local, territorial and tribal bar associations;

FURTHER RESOLVED, That the American Bar Association encourages lawyer referral services sponsored by state, local, territorial and tribal bar associations to adhere to the standards of the American Bar Association Model Supreme Court Rules Governing Lawyer Referral and Information Services;

FURTHER RESOLVED, That the American Bar Association shall consider and thoroughly discuss with its constituent members, who are represented by state and local bar associations, in advance of approving any program or legal service initiative that may result in an individual or business hiring an attorney for a fee.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The American Bar Association has four articulated Goals, the fourth Goal being to advance the rule of law. Among the objectives of Goal IV is to “assure meaningful access to justice for all persons.” For more than 70 years, state and local bar associations have been on the front lines of assuring meaningful access to justice through public service lawyer referral and information services. The Philadelphia Bar Association and the co-sponsors of this Resolution are proposing that the American Bar Association reaffirm its longstanding commitment to supporting state and local bar association lawyer referral and information services.

2. Summary of the Issue that the Resolution Addresses

Rapid changes in technology have created both opportunities and risks for members of the public who access legal information or services in an unregulated environment over the Internet. If there are inadequate standards for the operation of the service or for attorney participation, then the objective to “assure meaningful access to justice for all persons” may not be met by these services.

The defining characteristic of a lawyer referral service is generally understood, if not explicitly described in statute or court rules, as the use of an intermediary to connect a potential client to a lawyer based on an exercise of discretion in accordance with sound standards. The ABA Model Supreme Court Rules Governing Lawyer Referral and Information Services provide verifiable standards with a focus on consumer protection.

Where vendors operate in an unregulated environment in competition with state and local bar association lawyer referral services, it is critical that any program involving such vendors be thoroughly vetted to ensure that the consumer is being protected.

3. Please Explain How the Proposed Policy Position will address the issue

This Resolution calls on the American Bar Association to support state and local bar association lawyer referral services that adhere to high standards of consumer protection through compliance with the ABA Model Supreme Court Rules Governing Lawyer Referral and Information Services. The American Bar Association’s support of these state and local bar association lawyer referral services will help them distinguish themselves from those services that do not maintain high standards.

This Resolution also calls on the American Bar Association to thoroughly discuss with its constituent members, represented by state and local bar associations, in advance of approving and program or legal service initiative that may result in an individual or business hiring an attorney for a fee. Through support of state and local bar association lawyer referral services and consultation with state and local bar associations regarding programs that may result in the hiring
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of a lawyer for a fee, the American Bar Association furthers the objective to “assure meaningful access to justice for all persons.”

4. Summary of Minority Views

None of which we are aware.
SPONSOR: Edward Haskins Jacobs

PROPOSAL: Amends §1.2 of the Constitution to include the following language as one of the purposes of the Association: “to defend the right to life of all innocent human beings, including all those conceived but not yet born.”

Amends §1.2 of the Constitution to read as follows:

§1.2 Purposes. The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government; to defend the right to life of all innocent human beings, including all those conceived but not yet born; to advance the science of jurisprudence; to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public.

(Legislative Draft - - Additions underlined; deletions struck-through)

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Report
to the
House of Delegates
of the
American Bar Association
by
Edward Haskins Jacobs

On a Proposal to Amend the ABA Constitution
to
Add this as a fundamental ABA purpose:

*To defend the right to life of all innocent human beings, including all those conceived but not yet born.*

For consideration at the August 8 and 9, 2016 Annual Meeting

The undersigned proposes that the American Bar Association Constitution, Article 1, Section 1.2 - Purposes - be amended by inserting the following language (between the quotation marks) after the first semicolon: “to defend the right to life of all innocent human beings, including all those conceived but not yet born;”.

Article 1 of the ABA Constitution is entitled “Name and Purposes.” Section 1.2 is entitled “Purposes.” Once amended, section 1.2 would read in full as follows:

The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government; *to defend the right to life of all innocent human beings, including all those conceived but not yet born*; to advance the science of jurisprudence; to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the profession and of the public. [The new language is in bold for the purpose of highlighting.]

Once again, God willing, I will move for the adoption of this proposal at the House of Delegates in San Francisco in August 2016. I made the same motion before the House of Delegates the last fifteen years in a row. My hope continues that some day our culture of death will be overcome. We lawyers must not turn a blind eye to our children being poisoned to death and torn apart in our midst. I may be crying in the wilderness, but the cry – and the thirst for justice it represents - will never die.
In none of the meetings of the House of Delegates where this proposal was considered was there an actual vote on the proposal.\(^1\) The first ten times, after the presentation of the proposal, the Standing Committee on Constitution and Bylaws reported to the House that the proposal is inconsistent with another purpose of the ABA - to uphold and defend the Constitution of the United States - and that therefore the proposal was “out of order.” Each time the Committee made that bold assertion without explaining why it is so (despite my explicit written request to the Committee in each of the last several years to explain in writing why this position is taken). And in each of those ten meetings, then a motion was made\(^2\) that the House postpone indefinitely action on my proposal. In 2010, Robert L. Weinberg from Washington, D.C., who disagrees with this proposal, nevertheless tried to get the House to vote directly on the proposal, but his motion was rejected. Bob made the same effort twice more, in 2013 and 2015.

In 2011, the Committee chairperson reported to the House that the Committee took no position on the merits of the proposal that the ABA defend the right to life of all innocent human beings, including those conceived but not yet born, but stated that the Committee disagreed that this subject should be addressed in the purposes section of the ABA constitution, since the constitution does not adopt policy “beyond the basics”; and as a result, clearly by arrangement with the Committee, another member of the House rose to move that the proposal be postponed indefinitely, and this was overwhelmingly approved by voice vote, with maybe only about five or so “nays” as far as I could tell.

In 2012, the Committee chairperson said that the proposal is inconsistent with other purposes of the Association and should be rejected, but he did not state why he concluded that the proposal is inconsistent with other purposes of the Association and did not specifically mention any of the inconsistent purposes. Then someone else moved, not that the proposal be rejected as suggested by the Chairperson, but rather that the proposal be postponed indefinitely. In the voice vote then taken, I’d say about 10 delegates opposed the motion, some quite vociferously. By overwhelming voice vote, the proposal was postponed indefinitely.

In 2013, Bob Weinberg opposed the motion to postpone indefinitely, arguing for a vote on the proposal itself; and another delegate, who also seemed to be opposed to the proposal, rose to say he agreed it should be voted on, and stated that the ABA can take positions on “moral issues,” and said the proposal is not inconsistent with upholding and defending the Constitution of the United States - such supposed inconsistency being the reason given for postponing action on the proposal year after year after year. This year there were many “nayes” on the vote to postpone indefinitely -

\(^1\) Of course, even if the proposal were voted upon and rejected, it could continue to be made year after year, into the future.

\(^2\) In 2001 by a non-committee member of the House, and in each time thereafter by the Committee representative himself or herself.
probably because more delegates wanted to vote the proposal down directly - but upon the voice vote that the ayes had it, and the proposal was again postponed indefinitely on the extraordinarily odd contention that defending the right to life of all innocent human beings is inconsistent with upholding and defending the Constitution of the United States. What a Constitution we must have!

In 2014, the Chair of the Standing Committee on Constitution and Bylaws said the proposal is “out of order and inappropriate” and a non-committee member of the House moved to postpone the proposal indefinitely. Although a House member rose to “bark at the moon,” seeking a vote on the proposal instead of postponing it; postponed it was, with maybe ten voice votes against. In 2015, three speakers raised the red herrings that the proposal asks the House to address not a legal issue, but rather a medical, theological, or a philosophical issue; or simply an issue of legal privacy, as reasons to postpone the issue indefinitely; or in Bob’s case, to reject it on its merits.

In 2001 the vote on the motion to postpone action indefinitely was 209 to 39, but you will never find the precise vote in the record of proceedings of that meeting, because even though the vote was displayed electronically on a large screen in the front of the room, the precise vote itself was not recorded. In 2002 through 2015 the vote on the motion to postpone indefinitely was taken by voice vote. In 2002 through 2015, with the noted exception of 2013, many uncounted voices intoned “yes,” and perhaps a hand full of people said “no,” except 2005, when I thought I heard maybe ten “no”s.

I want to see the House pass this proposal, but I realize passage now would take a miracle. This is driven home in each when new members of the House who have never been members before stand up in order to be introduced to the assemblage. Each year there are well fewer than twenty new members. And, of course, the House several years ago defeated a term limits proposal. It would seem, then, that the House of Delegates is

Although the ABA has an annual budget of over $200 million, the House of Delegates is not willing to commit the relatively minor sum it would take in order to bring transparency and accountability to the actions of the House by having every member’s vote electronically recorded when it deals with the most important matters, such as amendments to the ABA constitution or bylaws, and the adoption, amendment, or rescission of ABA policy positions. In 2001, I presented to the ABA House of Delegates a proposal to bring that transparency and accountability to the House and to have the results posted for a year on the ABA website. It failed miserably, with only about ten of the 500 or so in attendance voting in favor (based upon my guestimate at the time of the voice vote). Transparency in actions of the House of Delegates should be pressed for every year until it is reached, but for now at least I leave that to others. In 2005 the chairperson of the House mentioned in his remarks that he, too, thinks the House should have electronic voting. And it would not take much money to bring accountability to the House of Delegates. At a CLE program in the Virgin Islands several years ago, hand-held voting devices were given to the attendees to make part of the program interactive, so it cannot be very expense, even if the individual votes, tied to specific members, are permanently recorded as part of the process. It is amazing in this day and age that the ABA House of Delegates is utterly opaque. The House intentionally refuses to put in place systems to reveal the votes of its members on the many important issues upon which it takes positions. No doubt the members of the House demand transparency of others in other contexts. The opaque nature of the House is indefensible. Amazing, really.
a pretty closed club with lots of long-term members. In addition to looking for that miracle, I am also hoping that the consciences of a few of the members will be pricked enough that they will be willing to “submit a salmon slip” and stand up in the House and speak out for the right to life of the innocents in the face of embarrassment and possible ostracism. Even if I have no chance short of a miracle for passage of the proposal, if we can just “get the ball rolling” with a little bit of courage from members who agree, who knows? The ABA House of Delegates is a speck, but an important speck in the process. Maybe before too many more years baby-killing-in-the-womb will go the way of slavery. It could happen.

“My section [bar association, committee, etc.] does not want its representative to vote on this kind of social issue” is not a legitimate position to take, is it? The House of Delegates addresses these kinds of issues dealing with human rights and legislative proposals every annual meeting. The current ABA policy manual includes these still-current policies of the ABA, each of which proclaims that the ABA: (1) Supports legislation on the federal and state level to finance abortion services for indigent women (adopted August 1978); and (2) Supports state and federal legislation which protects the right of a woman to choose to terminate a pregnancy before fetal viability, or thereafter, if necessary to protect the life or health of the woman.; and opposes state or federal legislation which restricts this right. (adopted August, 1992). Other related and likely still current ABA policies are listed toward the end of this report.

The representative of your section, etc., must be ready to address fundamentally important legal issues if your section, etc., is to be fully represented in the House. If you are not up to taking on this mantle as a fully functioning delegate to the House, shouldn’t you resign your position? Please, stand up and be counted. If you don’t, won’t you regret it in the end, when you look back on your life seeking evidence of courage? I write as I do in this paragraph because I cannot believe that only ten members of the House, or fewer, recognize the obvious truth of my argument. So, once again, on to the meat of the issue:

Feminism - here meaning the conviction that women’s government-enforced rights and privileges have been neglected in the past and now need augmentation - begs the question, how far should women’s “rights” go? If you are a mother with a child in your womb, and if bearing your child to term or keeping your child after birth would be embarrassing, inconvenient, career-killing, poverty-causing, husband-limiting, depressing, or physically more than normally risky, do you have the right to kill your child as a legally-approved exit from motherhood, as long as you do it before your child fully emerges from the protection of your body?

Or does your child, by her mere humanity, have a sacrosanct right to live, and continue to develop and grow in liberty and pursue happiness as she comes to know it? The answer: Human life, including that of our littlest ones, is sacred. This realization was one of the greatest advances of Christianity over the paganism that condoned exposing unto death the unwanted child. Abortion in our society is quicker than exposure, and is hidden away in the womb (or at the end of the birth canal) so that we
can lie to ourselves about what we are doing. But respect for innocent human life must be fundamental to civilized society, as “Thou Shalt Not Kill” signifies.

We should know that human life is sacred and to be defended against all competing claims of “right.” Our nation’s declaration of birth - the Declaration of Independence of July 4, 1776 - set forth the raison d’etre for the United States of America as a separate nation. The Declaration asserted that it is self-evident that all men are endowed by their Creator with the unalienable right to life; and that governments are instituted among men to secure the rights to life, liberty, and the pursuit of happiness. This insistence upon governmental protection of the right to life of all innocent human beings must be a fundamental function of any legitimate government.

The Creator referenced in the Declaration of Independence chose to have each new child begin life within his or her mother. The child in the womb has her own unique set of DNA. She is a separate human being - not simply part of her mother. On April 23 and 24, 1981 a United States Senate Judiciary subcommittee held hearings on the question: When does life begin? The internationally known group of geneticists and biologists had the same conclusion - life begins at conception.

The stories one hears about mothers on their way to have a child in the womb poisoned to death or ripped apart by an abortionist, suddenly having a change of heart when they see a another mother walking by holding and cuddling her baby, or seeing a poster of a baby with the words “Abortion kills,” are heart-warming, but they also underscore how the general discussion of the abortion problem in the media depersonalizes the separate human being held by God’s design in the vessel of her mother. That’s another, separate human being in there - one who has the right to life, liberty, and the pursuit of happiness, just as we do, no matter how deeply we stick our heads in the sand.

Shouldn’t we recognize the zygote, the embryo, the fetus in the womb of a human mother as another human being - one who has rights? I recommend you check out the website for the journal First Things and click through to “Condic” in the authors search box. You’ll find several articles by Maureen L. Condic, an associate professor of neurobiology and adjunct professor of pediatrics at the University of Utah School of Medicine. She points out (in her May 2003 article, “Life: Defining the Beginning by the End”) that the common arguments about when human life begins are only of three general types: arguments from form, arguments from ability, and arguments from preference, and that these arguments are all highly subjective, amounting to arguments that the new organism growing in the womb is not a human being worthy of protection in law because it is tiny, or because it is not a “person,” or because it is early in its development.

Dr. Condic rightly rejects the use of these three flawed arguments about when life begins. Instead, she cogently argues that we should determine when the new human organism begins, because that is the true beginning of the human being. She points out
that one must distinguish between mere living cells that are not organized into an organism, and living organisms. Dr. Condic points out that “[o]rganisms are living beings composed of parts that have separate but mutually dependent functions. While organisms are made of living cells, living cells themselves do not necessarily constitute an organism. The critical difference between a collection of cells and a living organism is the ability of an organism to act in a coordinated manner for the continued health and maintenance of the body as a whole. ... Unlike other definitions, understanding human life to be an intrinsic property of human organism does not require subjective judgments regarding ‘quality of life’ or relative worth. A definition based on the organismal nature of human beings acknowledges that individuals with differing appearance, ability, and ‘desirability’ are, nonetheless, equally human. ... Once the nature of human beings as organisms has been abandoned as the basis for assigning legal personhood, it is difficult to propose an alternative definition that could not be used to deny humanity to virtually anyone.” The zygotes, the embryos, the fetuses in the wombs of human mothers are all human organisms; that is to say, human beings.4

But can any of us, with what we know about the child’s unique set of DNA beginning at conception, even pretend now that this is not true? The possibility of twinning does not diminish the recognition that upon conception there is brand new, separate, unique human life in the mother’s body – a new person or persons. The mother is responsible for taking care of that child, but she does not own the child – God does. Slavery made the mistake of thinking that one human being can own another. We now know that no man should be permitted under man’s law to own another. But how can one justify killing another innocent human being if one does not own him? The inconvenience and burden of the other’s life on one’s own is not enough. The burden of the dependent relation does not end at the birth canal. How far should the right to kill those dependent upon us go? Should the standard evolve from the complete dependence of the womb to the excessive dependence of severe mental retardation and severe physical handicaps?

Just because the child is held and nourished within her mother does not give her mother the right to kill her. To the contrary, the mother with a child in the womb has a special responsibility to protect and care for her child. The generally recognized principle that parents must take care of their children once they are born applies as well to the children while they are growing and developing in the womb. I am not judging here the status of the soul of those who have had abortions or who commit abortions. I leave that (and the judging of my own soul) to God. But what we must judge as a people is what actions are so intrinsically evil, and do such harm to others who are innocent of

4 In her May 23, 2013 testimony before the Committee on the Judiciary of the U. S. House of Representatives on H.R. 1797, which would require a 20 week fetus to be protected from pain, Dr. Condic noted that “it is entirely uncontested that a fetus experiences pain in some capacity, from as early as 8 weeks of development.” She further noted, “Imposing pain on any pain-capable living creature is cruelty. And ignoring the pain experienced by another human individual for any reason is barbaric.” Dr. Condic went on to note, “Given that fetuses are members of the human species - human beings like us - they deserve the benefit of the doubt regarding their experience of pain and protection from cruelty under the law.” [Italics in original.]
wrongdoing (such as killing them), that the State, any decent State, must prohibit those actions from being inflicted on their victims. Obviously, the baby in the womb is the victim of abortion.

I do not want to offend the women who have been bamboozled by our abortion culture, but is not abortion the ultimate hate crime - the turning of legendary motherly love to the hatred of, and the killing of, one’s own child? Perhaps it is indifference to the child rather than hatred of the child, but this may be worse in its own way, as they say the opposite of love is not hate, but apathy.

Motherly love was known through the centuries until recently as the gold standard of love – unselfish and without limit – the willingness to give one’s very life for one’s child. This love is the foundation for a culture of life. Abortion is the foundation for our culture of death. Speaking of being bamboozled, recall the serpent in the Garden of Eden, enticing Eve to eat the forbidden fruit on the promise that she would become like God. Now mothers are enticed into abortion with the lie that they can become like men, and needn’t be burdened with child in the womb or that child after birth. Eat the fruit of abandonment of your child and freedom is yours. A Faustian bargain if ever there were one.

The United States of America fails in its fundamental mission if it refuses to secure for the weakest and most vulnerable innocent people amongst us the rights to life, liberty, and the pursuit of happiness. The ABA fails in its mission if it fails to stand up for the rights of the powerless. If we deny the right to life for children in the womb because they are developmentally immature (and therefore, in the eyes of some, not “persons”), then we not only tragically deny these children their rights - we open the door to infanticide and the killing of other weak and infirm people. There is a crisis in the United States over the loss of our moral roots. The ABA, which claims to be the voice of the legal profession, and to be an advocate of the protection of fundamental rights, should become a strong voice for all the weak and vulnerable innocents who so desperately need champions now.

We would do well also to realize that the Constitution of the United States - and the Supreme Court's interpretation of it - is not the fundamental source of human rights within the United States. Our rights to life, liberty, and the pursuit of happiness do not arise out of our own "social contract" - the Constitution. To the contrary, as the Declaration asserts, these rights are endowed upon us by our Creator. The rights of the child are a burden to the mother, but fundamental rights of others are a burden we must bear.

At the 2001 Annual Meeting, the Chair of the Standing Committee on Constitution and Bylaws reported that the Committee “voted to recommend to the House that the proposal be considered out of order, in that it is inconsistent with the first purpose clause of Association's Constitution, which is … ‘To uphold and defend the Constitution of the United States and maintain representative government.’” The same
claim was made in subsequent years, until 2011, when the Committee took no position “on the merits of the proposal,” but asserted the proposed language does not merit inclusion in the purposes section of the ABA constitution. Then in 2012 the Committee said the proposal should be rejected due to unexplained inconsistencies with other Association purposes.

Although the Committee changed its position in 2011, it went back to the earlier position in later years, so I hereafter explain again why defending the right to life of all innocent human beings, including all those conceived but not yet born, is consistent with supporting and defending the Constitution of the United States. Later in this report I explain why the language I propose does belong in the purposes section of the ABA constitution, which positioning has also been opposed by the Standing Committee on Constitution and Bylaws.

So, the inconsistency contention has no merit. First the obvious: Nowhere does the actual language of the United States Constitution specify that the States may not defend the right to life of each and every innocent human being within their respective jurisdictions (including all those conceived but not yet born). So the claim that the defense of such life is inconsistent with defending and upholding the Constitution is on its face highly suspect. If the inconsistency argument does not rest on the actual language of the Constitution, let us go beyond the actual language of the Constitution and try to articulate the argument. The inconsistency argument could be so stated:

1. Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey prohibit each State from defending the right to life of each and all innocent human beings conceived but not yet born, within the State’s jurisdiction.

2. The Supreme Court has determined that the Constitution’s penumbra of privacy rights attendant to the pregnant mothers is what prohibits the States from defending the right to life of each and all those conceived but not yet born.

3. Therefore, it is the Constitution itself that prohibits the defense by the States of the right to life of all those conceived but not yet born.

4. Therefore, advocating the defense of the right to life of all those conceived

5 It is good that the Committee’s position in the first ten years and then each year after 2011, implicitly admitted that the children being killed in their mother’s wombs are in fact innocent human beings, not just blobs of tissue that are part of the mother’s body. That realization is step number one.

6 Like St. Thomas Aquinas, I construct the argument against my position. I have repeatedly asked the Standing Committee on Constitution and Bylaws to articulate the reason for its – to me, bizarre – position that taking a stance defending the right to life of all innocent human beings including all those conceived but not yet born is somehow inconsistent with upholding and defending the Constitution of the United States, but the Committee refuses to articulate the reasons for its position – either orally or in writing.
but not yet born is inconsistent with upholding and defending the Constitution since the Constitution prohibits that defense.

But it cannot be reasonably be said (1) that the holdings of Roe v. Wade and Doe v. Bolton, as modified by Planned Parenthood v. Casey are the Constitution itself - and (2) that if one opposes Roe, Doe, and Planned Parenthood, one is opposing the Constitution itself - and failing to uphold and defend it. The lack of identity of particular Supreme Court interpretations of the Constitution with the Constitution itself should be rather self-evident. No doubt you (the members of the House) are aware that legal conclusions underlying many Supreme Court decisions - including those interpreting the Constitution - have been rejected by later Supreme Court decisions although the relevant language of the Constitution has not changed in the interim. Thus, generally, contending that opposition to a particular Supreme Court interpretation of the Constitution constitutes opposition to the Constitution itself is stretching language and logic to the breaking point.

Now, maybe a persuasive argument could be made that although some Supreme Court interpretations of the Constitution are subject to later change, some are so indisputably correct that in some real sense the interpretation could be said to be the Constitution itself. If the Supreme Court rationale for Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey were so rock-solid and accepted by American society in general as the proper articulation of a virtually undisputed fundamental individual right grounded in the Constitution, one could argue that in effect these Supreme Court decisions are equivalent to the Constitution; but that is certainly not the case with Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Casey. (And note that Planned Parenthood itself modified fundamental holdings of Roe and Doe.)

The truth is quite to the contrary of the position of the Standing Committee on Constitution and Bylaws. The reality is that the rationale underlying these two Supreme Court decisions deserves no support from an organization pledged to uphold and defend the Constitution of United States. This is because the underlying rationale for the decisions is bogus, even if one accepts the concept of the privacy rights penumbra. The Supreme Court's opinion in Roe v. Wade takes the position that neither Texas nor any other State may legislatively determine that human life begins at conception, since (the Court asserted) there is uncertainty over the legitimacy of that claim - that human life does begin at conception. But this claimed uncertainty is a figment of the Supreme Court's imagination. There is no real uncertainty over the point at which each human life begins - we all have our own unique set of 46 chromosomes. This set is forged at the moment of conception. The new child (or, perhaps, eventually, the new twins) is new human life - residing within the child's mother, but not simply a part of her.

Based on the faulty contention that the child in the womb cannot properly be legislatively determined to be a human being, the Supreme Court denigrated the child to the status “potential life,” stripping the child of her rightful status under the law as a human being. The Court then set up a false dichotomy of competing rights: the mother's “right to privacy” right to kill the non-human blob in her womb verses the
State's interest in protecting the “potential life” in the womb and the health of the mother.7 (Referring to a living being with its own DNA as “potential life” is doublespeak at its best.) The hand dealt the child in the womb by the Supreme Court was dealt from a stacked deck - based upon the lie that the child in the womb is not really a child. As a “potential life” rather than a real, live human being, the child's real rights get pushed aside by the Supreme Court. The rationale of Roe v. Wade is not indiscutable (and thus, one might argue, the Constitution itself); rather, the rationale of Roe v. Wade is fatuous.

Finally, the proposal (and all already articulated purposes in ABA Constitution Section 1.2) presupposes the ABA defense of the right to life of the innocents will be undertaken by lawful means. Suppose the ABA as an organization were to advocate a change through lawful means in the language of the United States Constitution (or in a Supreme Court interpretation of the Constitution). Would this mean the ABA had abandoned its purpose to uphold and defend the Constitution? Of course not. We have an obligation to address constitutional issues that need addressing. We honor the Constitution by doing so. So, even if I were advocating change in the language of the Constitution by lawful means, my proposal would not conflict with the ABA purpose to uphold and defend the Constitution.

In 2011 and at other times, the Committee on Constitution and Bylaws has suggested that what I advocate is a policy position for the ABA, not a purpose of the ABA, and therefore my proposal should be rejected on the ground that it does not belong in Section 1.2 of the ABA Constitution. I disagree with this contention also. After all, what is a purpose? A purpose is simply a fundamental policy. The innocent human beings in the wombs of their mothers (many of whom have become mortal enemies of their own children) cry out for our country to renew its commitment to the basic principles of the Declaration of Independence - that every innocent human being has the right to life, liberty, and the pursuit of happiness. And it is not just the innocents in the womb who cry out for champions. We are sliding down the slippery slope of disregard for the sanctity of human life for many outside the womb as well - the old, the infirm, and the disabled. If we do not wake up and start standing up for what is right, soon many of these innocents will have to be justifying why their lives should be spared - why we should be spending money and effort on their inconvenient and bothersome lives. The intentional killing of perhaps 1.2 million innocent human beings by abortion in the United States each year in recent years (and even more before) is such

7 Nor does basing a supposed constitutional right to abortion upon the Equal Protection Clause of the Fourteenth Amendment ( . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”) to the United States Constitution, as advocated by Justice Ginsburg and three other Justices in the Ginsburg dissent in Gonzales v. Carhart, 550 U.S. 124, 172 (2007) make any more sense. The child in the womb is still a human being, a child, and her right to life trumps the mother's interest in having her killed, whether based on a supposed right to privacy or upon the Equal Protection Clause. See also, Erika Bachiochi, Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights, Harvard Journal of Law & Public Policy, vo. 34, no. 3, Summer 2011.
an affront to justice that the ABA should make defending the rights of those (and other) innocent beings one of its fundamental policies – one of its very purposes.

Remember the argument over the propriety of amending the U.S. Constitution with the Bill of Rights shortly after the approval of the Constitution itself? There were those who argued that it is unnecessary and inappropriate to articulate in the Constitution these rights of the people and of the States against intrusion by the federal government, since the federal government was permitted to exercise only those powers granted to it in the Constitution anyway. But those rights articulated in those first ten amendments were considered so fundamental that they should be explicitly set forth in the Constitution itself.

Well, our country has abandoned its fundamental argument for its own formation when it denies to some innocents the inalienable God-given right to life itself, allowing others with the sanction of law to kill off innocents. This is a fundamental perversion of what the United States should be. The ABA should make the correction of this deviation one of its bedrock, fundamental policies – that is, one of its very purposes of being. The ABA goes on and on nowadays about its support of “the rule of law,” but where is that support when it comes to children in the womb? Where are their lawyers defending their rights? Where is the defense and pursuit of justice here?

The Committee claimed that the subject of the proposal is not fundamental enough - or is not of the right character - to be included in the purposes section of the ABA constitution. But compare a stance against stripping the right to life from millions of innocents to the purposes that are in the ABA constitution. Defending the right to life of innocents when it is being denied by our “law” is much more fundamental than even the upholding and defending of our hallowed U.S. Constitution and representative government. The ABA purpose I propose goes to the very heart of what an association of American lawyers should be all about. We are supposed to be the upholders of the law. We are supposed to champion those whose rights are being disrespected. Incredibly, a fundamental disrespect for a category of persons’ rights has been incorporated as a fundamental tenant of our American “law.” A stand against this cries out for inclusion in the purposes section of the ABA constitution.

Matters of much lower import and importance to our law and our role as lawyers are already included in the articulation of ABA purposes. My proposal is more fundamental than the ABA constitution existing purposes to “advance the science of jurisprudence”, “promote the uniformity of legislation and of judicial decisions”, “uphold the honor of the profession of law”, and to “encourage cordial intercourse among members of the American bar.” The Committee is wrong when it says that my proposal does not belong in the purposes section of the ABA constitution.

At the House of Delegates in August 2001, the speaker who advocated postponing the proposal indefinitely said that the proposal “changes fundamentally the purpose of the American Bar Association and the Constitution and Bylaws, and has ramifications
over a wide array of policy that the Association has adopted and implemented." I have reviewed the ABA *Policy and Procedures Handbook* and note here policy positions taken by the ABA that are, or may be regarded as inconsistent with the proposal being made hereby.

The ABA *Policy and Procedures Handbook* lists hundreds of standing policies adopted by the ABA over the years, although action was taken at the 2001 meeting to “archive” some policies over ten years old, taking them off the list of current policy positions. Way back in 1978, the ABA adopted a policy, still in the 2013-2014 *Handbook*, supporting federal and state legislation to “finance abortion services for indigent women.” In 1991, the ABA adopted a policy supporting legislation to promote “full counseling and referrals on all medical options” in federally funded family planning clinics. In 1992, the ABA adopted a policy, still in the 2013-2014 *Handbook*, opposing federal legislation restricting abortions prior to viability and thereafter if the abortion is “necessary to protect the life or health of the woman ... .” And in 1994, the ABA adopted a policy recommending that the United States, at the Fourth World Conference on Women in Beijing, China, in 1995, “actively support the inclusion in the Platform for Action of [e]ffective measures to accelerate the removal of the remaining obstacles to the realization of women’s basic rights.” At the annual meeting in 2001 the ABA adopted a policy provision opposing the Mexico City Policy, which prohibits overseas funding by the United States of nongovernmental organizations that provide abortion-related health or medical services. The ABA House of Delegates has also fairly recently adopted a policy implicitly approving government-funded killing of innocent human beings in their embryonic stage for stem cell and other research work.

If the proposal is adopted, inconsistent policies would be revoked by implication. Legal protection for all innocent human life is essential to a properly ordered society. Advocacy of such protection should be fundamental ABA policy.

In John F. Kennedy’s 1961 inaugural address he rightly said, “The rights of man come not from the generosity of the state, but from the hand of God.” Professor Robert P. George of Princeton University gave an address at Georgetown University the day after President Obama’s initial presidential inauguration. In urging his listeners to pray for an end to legal abortion in the United States, Professor George said, “We must ask God’s forgiveness for our great national sin of abandoning the unborn to the crime of abortion and implore His guidance and assistance in recalling the nation to its founding ideals of liberty and justice for all.”

Feel free to email me at edwardjacobs@yahoo.com.

PROPOSAL: Amends §2.1 of the Association’s Constitution to realign the districts.

(Legislative Draft – Additions underlined; deletions struck through)

Article 2. Definitions and General Provisions

§2.1 Definitions. In this Constitution, the Bylaws, and any rules of the House of Delegates the term:

... (g) “District” refers to the following areas with states listed in the rotational order of representation on the Board, which order within a district may be varied by unanimous agreement among the affected states:

At the conclusion of the 2004 2017 Annual Meeting:

<table>
<thead>
<tr>
<th>District</th>
<th>States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Rhode Island, Maine, Vermont, New Hampshire</td>
</tr>
<tr>
<td>2</td>
<td>Connecticut, Michigan, Massachusetts</td>
</tr>
<tr>
<td>3</td>
<td>New Jersey, Pennsylvania</td>
</tr>
<tr>
<td>4</td>
<td>Virginia, District of Columbia</td>
</tr>
<tr>
<td>5</td>
<td>Kentucky, Alabama, North Carolina</td>
</tr>
<tr>
<td>6</td>
<td>Louisiana, Tennessee, Georgia, Maryland</td>
</tr>
<tr>
<td>7</td>
<td>Ohio, Illinois</td>
</tr>
<tr>
<td>8</td>
<td>Florida, Texas</td>
</tr>
<tr>
<td>9</td>
<td>Missouri, Minnesota, Wisconsin</td>
</tr>
<tr>
<td>10</td>
<td>Wyoming, Nebraska, South Dakota, North Dakota</td>
</tr>
<tr>
<td>11</td>
<td>Arizona, Colorado, Oklahoma</td>
</tr>
<tr>
<td>12</td>
<td>Arkansas, Iowa, New Mexico, Tennessee, Kansas, Louisiana</td>
</tr>
<tr>
<td>13</td>
<td>Montana, Alaska, Oregon, New Mexico, Puerto Rico</td>
</tr>
<tr>
<td>14</td>
<td>California</td>
</tr>
<tr>
<td>15</td>
<td>New York</td>
</tr>
<tr>
<td>16</td>
<td>South Carolina, Delaware, Mississippi, West Virginia, Arkansas</td>
</tr>
<tr>
<td>17</td>
<td>Utah, Hawaii, Nevada, Idaho</td>
</tr>
<tr>
<td>18</td>
<td>Maryland, Washington, Indiana, Connecticut</td>
</tr>
<tr>
<td>19</td>
<td>Iowa, Oregon, South Carolina</td>
</tr>
</tbody>
</table>
REPORT

REDISTRICTING PROPOSAL

I. OVERVIEW

One of the Governance Commission proposals before the House last August was Resolution 11-6B(3). This Resolution recommended revising the language of Article 16.1 of the Constitution, which provides that the Governance Commission’s decennial review of the Board of Governors shall include a review of the issue of districting “in terms of ABA membership.” The Governance Commission proposed to change the language in Article 16.1 to reflect the fact that, since the 1995 Governance Commission, the assignment of states to districts has been based on lawyer population, with a goal of grouping states with similar numbers of lawyers. However, the Governance Commission proposal to change the language in Article 16.1 to base districting on lawyer population failed in the House.

In June 2015, the Board of Governors approved the extension of the Governance Commission’s authority to continue its review and consideration of the issue of districting. In light of the action taken in the House with respect to Article 16.1, the Governance Commission has developed a new re-districting proposal based on ABA membership. (See Appendix A.)

II. PROPOSAL TO REDUCE LENGTH OF ROTATION

This proposal seeks to (i) avoid having a state with significant ABA membership move from its current three year rotation on the Board of Governors to a six year rotation, and (ii) reduce the number of years in which other states are not represented on the Board of Governors. At the same time the proposal seeks to maintain the ABA Board at a reasonable and workable size. In fact, if the proposal is adopted, the change in the size of the Board would not be significant, as it would increase by one, from 42 members to 43 members.

Significantly, no ABA group will be adversely affected in a meaningful way, and importantly, the proposal would be beneficial by reducing the number of years in the rotation for board seats.

Four states would move from a three-state to a two-state rotation (reducing their period of no Board representation from six years to three years). Four states would move from a four-state to a three-state rotation (reducing their period of no Board representation from nine years to six years).1 Michigan, Georgia, Massachusetts and Maryland would move from a three-state to a two-state rotation. Iowa, Oregon, Kansas and South Carolina would move from a four-state to a three-state rotation.

The other 44 states would not have any change in the number of states in their District. Three of those states would have a one-time gain in their next rotation (Arkansas would have a 3 year gain; Connecticut and New Mexico would have a 1 year gain).

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1 While the move for Oregon would result in a delay in its next term on the Board from 2019 to 2020, Oregon would move from a nine-year to six-year rotation on the Board.
Alabama – No change.

Alaska - No change.

Arizona - No change.

Arkansas - After its current rotation, moves from Dist. 12 to Dist. 16; 3 year gain in next rotation; remains in 4 state district.

California - No change.

Colorado - No change.

Connecticut – Moves from Dist. 2 to Dist. 18; 1 year gain in the next rotation; remains in 3 state district.

Delaware - No change.

District of Columbia - No change.

Florida - No change.

Georgia - Moves from 3 state to 2 state rotation; remains in Dist. 6.

Hawaii - No change.

Idaho - No change.

Illinois - No change.

Indiana - No change.

Iowa - Moves from Dist. 12 to new Dist. 19; moves from a 4 state to a 3 state rotation.

Kansas – Moves from a 4 state to a 3 state rotation; next rotation would accelerate 2 years; remains in Dist. 12.

Kentucky - No change.

Louisiana - After its current term; moves from 4 state to 3 state rotation; moves from Dist. 6 to Dist. 12.

Maine - No change.

Massachusetts - Moves from 3 state to 2 state rotation; remains in Dist. 2.

Michigan - Moves from 3 state to 2 state rotation; remains in Dist. 2.

Minnesota - No change.

Mississippi - No change.

Missouri - No change.

Montana - No change.

Nebraska - No change.

Nevada - No change.

New Hampshire - No change.

New Jersey - No change.

New Mexico - Moves from Dist. 12 to Dist. 13; 1 year gain in next rotation; remains in 4 state rotation.

New York - No change.

North Carolina - No change.

North Dakota - No change.

Ohio - No change.

Oklahoma - No change.

Oregon - Moves from 4 state to 3 state rotation; next rotation would be delayed 1 year; moves from Dist. 13 to new Dist. 19.

Pennsylvania - No change.

Puerto Rico - No change.

Rhode Island - No change.

South Carolina - Moves from 4 state to 3 state rotation; moves from Dist. 16 to new Dist. 19.

South Dakota - No change.
Maryland – Moves from 3 state to 2 state rotation; moves from Dist. 18 to Dist. 6.

Tennessee - Moves from Dist. 6 to Dist. 12; no change in rotation.

Texas - No change.

Utah - No change.

Vermont - No change.

Virginia - No change.

Washington - No change.

West Virginia - No change.

Wisconsin - No change.

Wyoming - No change.
The Overall Impact

8 states move from 4 to 3 state or 3 to 2 state rotation:

<table>
<thead>
<tr>
<th>State</th>
<th>ABA Membership</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michigan</td>
<td>8,120</td>
</tr>
<tr>
<td>Georgia</td>
<td>8,622</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>10,940</td>
</tr>
<tr>
<td>Maryland</td>
<td>9,285</td>
</tr>
<tr>
<td>Iowa</td>
<td>2,454</td>
</tr>
<tr>
<td>Oregon</td>
<td>3,281</td>
</tr>
<tr>
<td>South Carolina</td>
<td>3,865</td>
</tr>
<tr>
<td>Kansas</td>
<td>2,336</td>
</tr>
</tbody>
</table>

The ABA membership of the 4 states moving to a 3 year rotation is as follows: Michigan (8,120); Georgia (8,622); Massachusetts (10,940) and Maryland (9,285). The next state with the highest level of membership is North Carolina (7,123). The ABA membership of the 4 states moving to a 6 year rotation is as follows: Iowa (2,454); Oregon (3,281); South Carolina (3,865); and Kansas (2,336). The next state with the highest level of membership is Utah (2,226).2

Of the remaining jurisdictions, 40 have no change in rotation and 3 states have a one-time gain in rotation. Arkansas gets a 3 year gain in its next rotation, and Connecticut and New Mexico get a one year gain.

The overall impact would be: no change for 40 states, a substantial benefit for 8 states and a less significant benefit for 3 states. No states would lose any rotation.

---

2 The Commission also reviewed the proposal by: (i) using total lawyer population in each state as reported to the ABA using the ABA criteria of active and resident lawyers and (ii) giving 50% weight to the total lawyer population numbers and giving 50% weight to the ABA membership numbers. If ABA membership is not examined, and only the total lawyer population numbers are utilized, Missouri (25,337) and Washington (24,844) would replace Virginia (24,062) and Maryland (23,902) as states in 2-state districts. Puerto Rico (15,318) and Utah (8,413) would replace Kansas (8,266) and Iowa (7,526) as states in 3-state districts. (See Appendix B.)
## Districts As Revised

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>District 2</td>
<td><strong>Connecticut</strong> (only until 2017), Michigan (2017-2020), Massachusetts (2020-2023)</td>
</tr>
<tr>
<td>District 6</td>
<td><strong>Louisiana</strong> (only until 2017), Georgia (2017-2020), Maryland (2020-2023)</td>
</tr>
<tr>
<td>District 8</td>
<td>Florida (2016-2019), <strong>Texas</strong> (2013-2016)</td>
</tr>
<tr>
<td>District 12</td>
<td><strong>Arkansas</strong> (only until 2017), Tennessee (2017-2020), Louisiana (2020-2023), Kansas (2023-2026)</td>
</tr>
<tr>
<td>District 14</td>
<td><strong>California</strong> (2015-2018)</td>
</tr>
<tr>
<td>District 15</td>
<td><strong>New York</strong> (2015-2018)</td>
</tr>
<tr>
<td>District 16</td>
<td><strong>Delaware</strong> (2015-2018), Mississippi (2018-2021), West Virginia (2021-2024), Arkansas (2024-2027)</td>
</tr>
<tr>
<td>District 19</td>
<td>Iowa (2017-2020), Oregon (2020-2023), South Carolina (2023-2026)</td>
</tr>
</tbody>
</table>

**Bold=Current Seat; Parenthesis=Term on Board**
### States with Ranking

<table>
<thead>
<tr>
<th>State</th>
<th>Total # of ABA Members as of 8/31/15</th>
<th>13-14 Rank</th>
<th>Total # of Lawyers as of 12/31/14</th>
<th>13-14 Rank</th>
<th>Total # of States in District</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York</td>
<td>37,882</td>
<td>1</td>
<td>172,630</td>
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<td>1</td>
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<tr>
<td>California</td>
<td>36,981</td>
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<td>165,952</td>
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<td>19,954</td>
<td>3</td>
<td>63,211</td>
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<tr>
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<td>74,258</td>
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<tr>
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<td>19,221</td>
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<td>2</td>
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<td>6</td>
<td>52,089</td>
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<tr>
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<td>13,059</td>
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<td>48,992</td>
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<tr>
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<td>43,974</td>
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<tr>
<td>New Jersey</td>
<td>10,539</td>
<td>7</td>
<td>41,569</td>
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<tr>
<td>Virginia</td>
<td>10,130</td>
<td>8</td>
<td>24,062</td>
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<tr>
<td>Ohio</td>
<td>9,708</td>
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<tr>
<td>Maryland</td>
<td>9,285</td>
<td>12</td>
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<td>Georgia</td>
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<td>23,136</td>
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<tr>
<td>Washington</td>
<td>6,547</td>
<td>16</td>
<td>24,844</td>
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<tr>
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<td>20</td>
<td>21,761</td>
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</tr>
<tr>
<td>Missouri</td>
<td>6,124</td>
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<td>23,337</td>
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<tr>
<td>Minnesota</td>
<td>5,886</td>
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<tr>
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<td>18,655</td>
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<td>Indiana</td>
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<td>15,883</td>
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<td>14,630</td>
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</tr>
<tr>
<td>South Carolina</td>
<td>3,865</td>
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<td>10,031</td>
<td>31</td>
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</tr>
<tr>
<td>Kentucky</td>
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<td>13,448</td>
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<tr>
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<td>2,885</td>
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</tr>
<tr>
<td>Iowa</td>
<td>2,454</td>
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<td>7,526</td>
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</tr>
<tr>
<td>Kansas</td>
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<td>5,970</td>
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</tr>
<tr>
<td>State</td>
<td>Code</td>
<td>Population</td>
<td>Change Rate</td>
<td>Population 2010</td>
<td>Change Rate 2010</td>
</tr>
<tr>
<td>---------------</td>
<td>------</td>
<td>------------</td>
<td>-------------</td>
<td>-----------------</td>
<td>-----------------</td>
</tr>
<tr>
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<td>1,765</td>
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<td>2,921</td>
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<tr>
<td>West Virginia</td>
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Amends §2.1 and §6.3 of the Association’s Constitution to define “accredited” and to clarify that the person elected as State Delegate must be accredited to the state for which elected.

Amends §2.1 and §6.3 of the Association’s Constitution to read as follows:

Article 2. Definitions and General Provisions

§2.1 Definitions. In this Constitution, the Bylaws, and any rules of the House of Delegates the term:

(a) “Accredited” with respect to Association membership and for the purpose of a member being a candidate and/or voting in Association elections means the state in which the lawyer is licensed.

§6.3 State Delegates. (a) To be eligible for election as State Delegate, a person must be accredited to the state for which elected. The members of the Association whose membership is accredited to a state shall elect by a plurality of the votes cast the State Delegate for that state in the House of Delegates. If there is a tie, the Board of Elections shall select the delegate by lot. If only one valid nominating petition is filed, the Board of Elections shall certify to the House of Delegates that the sole nominee is elected. The term of a State Delegate is three Association years, beginning with the adjournment of the annual meeting next following that delegate's election. A State Delegate may not serve for more than three consecutive full terms. A State Delegate elected as an officer or member of the Board of Governors ceases to be a State Delegate at the beginning of the term as officer or governor.
REPORT

In 2014, the Board of Elections recommended that the current language outlined in the Association’s Constitution and all related notices regarding State Delegate Elections be revised to better define “accredited.” The Board of Elections agreed that the accreditation of state should be the state in which the member is licensed to practice. A proposal was submitted for consideration by the House of Delegates at the 2014 Annual Meeting and subsequently withdrawn to address concerns raised by Association members.

The proposal has been redrafted and is being resubmitted to provide clarity to members voting in State Delegate Elections. The proposal amends §2.1 and §6.3 of the Constitution to define “accredited” and to clarify that the person elected as State Delegate must be accredited to the state to which elected. The amendment would conform the language in the Association’s Constitution to what is required by the State Delegate Election Guidelines in addition to defining “accredited.” The proposal is necessary to establish parameters and to clarify that accreditation for voting purposes should be determined by the state the member is licensed to practice. This proposal also is intended to encourage participation while preventing abuse.

The Committee considered whether to recognize all the state bars a member belongs to or whether members should select the state for counting and voting purposes. Being counted in more than one state would affect the number of delegates in the House. The Committee determined that a member could choose which state to be accredited to, but the member also must be a member of the bar of the state identified. It was the consensus of the Committee that members who are licensed to practice in more than one state should not be allowed to vote in multiple states. In such instances, members would be contacted and asked to select the state in which they wanted to vote. Only 18% of ABA members are licensed to practice in multiple states. The ABA membership system currently has a field for state bar admission which is a mandatory field and identifies the state where the member is admitted to practice. For election purposes, the ABA would have the ability to retrieve data for members as identified by this field. “Accredited” with respect to Association membership and for the purpose of a member being a candidate and/or voting in Association elections would mean the state in which the lawyer is licensed to practice.

Respectfully submitted,

David S. Houghton  
Sidney Butcher  
F. John Garza  
Janet Green-Marbley  
Sandra R. McCandless  
Robert D. Oster  
Ethan Tidmore  
Mary T. Torres, ABA Secretary

August 2016
Amends § 6.4(a) of the ABA Constitution to provide the United States Virgin Islands with a young lawyer delegate.

§6.4 State Bar and Local Bar Association Delegates. (a) A state bar association is entitled to at least one delegate in the House of Delegates, except that if there is more than one state bar association in a state the House shall determine which associations may select delegates. A state bar association in a state that has more than 4,000 lawyers is entitled to an additional delegate for each additional 2,500 lawyers above 4,000 until it is entitled to four delegates. A state bar association in a state that has more than 14,000 lawyers and not more than 20,000 lawyers is entitled to five delegates. If it has more than 20,000 lawyers, it is entitled to six delegates. If the bar associations of a state are entitled to four or more delegates, at least one delegate representing the state bar or a local bar association in that state must have been admitted to practice in his or her first bar within the past five years, or must be less than 36 years old at the beginning of the term. Each state delegation, as well as the United States Virgin Islands, that did not have an additional young lawyer delegate prior to the 2015 Annual Meeting shall be entitled to one additional delegate, chosen by either the state bar association or one of the qualifying local or bar associations referred to in Articles 6.4(b) and 6.9 below, provided that such delegate was admitted to his or her first bar within the past five years or is less than 36 years old at the beginning of his or her term. It is the responsibility of the state bar association to ensure that this requirement is satisfied. However, a state bar association is entitled to at least as many delegates as it was entitled to certify at the 1990 annual meeting.

(Legislative Draft – Additions underlined; deletions struck through)
was admitted to his or her first bar within the past five years or is less than 36 years old at the beginning of his or her term. It is the responsibility of the state bar association to ensure that this requirement is satisfied. However, a state bar association is entitled to at least as many delegates as it was entitled to certify at the 1990 annual meeting.
At the 2015 Annual Meeting in Chicago, the House of Delegates unanimously approved Resolution 11-6A(3), which amended § 6.4(a) of the ABA Constitution to provide every state delegation with a young lawyer delegate. In its report, the Commission on Governance stated that it “views this change as an opportunity to recognize the importance of having younger voices in our Association,” and that enlarging the House “may be worth the input from young lawyers in the consideration of matters that come before the House of Delegates as well as the message it sends to young lawyers regarding the importance the ABA places on their participation.”

As demonstrated by the Resolution’s unanimous passage, members of the House of Delegates agreed that young lawyers provide a valuable voice in ABA governance. Unfortunately, the amendment effectuated by Resolution 11-6A(3) did not provide the United States Virgin Islands with an additional young lawyer delegate, as it did with the 50 states, the District of Columbia, and Puerto Rico. This is because § 2.2 of the ABA Constitution does not define the United States Virgin Islands as a “state.”

It is understandable why the Commission on Governance may not have wished to provide every United States territory with an additional young lawyer delegate. Neither the Guam Bar Association, the CNMI Bar Association, nor the American Samoa Bar Association have established a young lawyers division, young lawyers section, young lawyers committee, or comparable entity. Thus, it is likely that any young lawyer seats designated for Guam, the Northern Mariana Islands, or American Samoa would remain perpetually vacant, since there is no organized young lawyer organization to fill them.

But this is not the case with the United States Virgin Islands. The United States Virgin Islands—a majority-minority jurisdiction and bar association—has been continuously represented in the House of Delegates since 1989 and on a per capita basis, is home to more lawyers than some states. In 1991, the Virgin Islands Bar Association established its Young Lawyers Committee, which immediately affiliated with the ABA Young Lawyers Division. The Young Lawyers Committee is one of the most active constituent parts of the Virgin Islands Bar Association, and it is represented in both the ABA Young Lawyers Division Assembly as well as on its Council (through a seat it shares with South Carolina). In fact, the United States Virgin Islands often sends more representatives to ABA Young Lawyers Division meetings than several states (not just on a per capita basis, but often in absolute terms as well!).

Goal III of the ABA Mission Statement, adopted by the House of Delegates in 2008, calls for “full and equal participation in the association, our profession, and the justice system by all persons.” The United States Virgin Islands is currently the only jurisdiction under the American flag with an active young lawyer organization that is not represented in the House of Delegates. It is our hope that, with the passage of this resolution, Virgin Islands young lawyers will have the same opportunity to have their voices heard in the House of Delegates as their counterparts in the 50 states, the District of Columbia, and Puerto Rico.
SPONSORS: Dynda A. Thomas (Principal Sponsor), John J. Beardsworth, Jr., Peter V. Lacouture, Mark C. Darrell, Michael A. McGrail, N. Beth Emery, Linda L. Randell, David R. Poe, Thomas P. Gadsden, Steven H. Brose, Robert B. Pringle, Patricia Dondanville, Robert L. Brubaker

PROPOSAL: Amends §10.1(a) of the ABA Constitution and Bylaws to reflect the name change of the Section of Public Utility, Communications and Transportation Law to the Infrastructure and Regulated Industries Section.

Amends §10.1(a) of the Constitution to read as follows:

1 §10.1(a) Sections and Divisions. (a) There are within the Association the following sections and divisions for carrying on its work:
2 …
5 Section of Public Utility, Communications and Transportation Infrastructure and Regulated Industries Section
6 …
The Section of Public Utility, Communications and Transportation Law (“PUCAT”) hereby provides notice of its intent to change its name to the “Infrastructure and Regulated Industries Section,” seeking the recommendation of the Board of Governors and approval of the House of Delegates at the 2016 ABA Annual Meeting in accordance with the ABA Constitution and Bylaws §30.2.

**PUCAT HISTORY**

Our Section was created at the ABA’s Annual Meeting in 1917 as the Section of Public Utility Law. The Section focused on industries that made electricity, natural gas, water, telephone, telegraph, and railroad service available to the general public. In the early 20th century, economists referred to these industries as “natural monopolies,” because they required massive financial investment for the development of physical systems and were driven to serve the largest number of customers possible to benefit from economies of scale. Regulation was imposed on those industries to assure reasonable rates to the public, promote quality of service and safety, and guarantee a reasonable rate of return for the investors in the utilities. Often described as being “affected with the public interest,” these private infrastructure companies became known as “public utilities” because the services they provided were recognized as essential to day-to-day living in emerging industrial cities.

Then in 1991, the Section’s name was changed to the Section of Public Utility, Communications and Transportation Law (our current name) in recognition of the many technological and regulatory developments that had substantively transformed the industries we serve. The emergence of competitive technologies undermined the assumed natural monopolies, thereby changing not only how services were provided but the nature of governmental regulation of them. In particular, it became imperative to clarify that our section serves not only the classic telephone, electric and natural gas utilities of the late-20th century, but also fast-changing telecommunications and transportation industries, parts of which were subject to a regulatory structure that recognized competition as an essential factor in the establishment of reasonable rates for service.

The 25 years since that name change have seen an even more rapid and fundamental evolution of our industries, including the increasing role of competition in the traditional telephone, electric, and natural gas industries. Most importantly, the term, “public utility,” has become increasingly archaic and ultimately pejorative among growing numbers of practitioners who work in this dynamic area of the law, particularly younger lawyers. We see that the term “public utility” is unnecessarily limiting as many younger lawyers describe their focus as “energy companies” or “telecommunications companies,” for example, rather than “public utilities.”

As a result, we find that although our current Section name attempts to describe the large scope of our industries, it not only does not capture all that we do but actually impedes our ability to attract newer, younger members who do not self-identify with working with “public utilities.” We continue to serve the same industries that provide the infrastructure for essential public services, but changes in environmental concerns, technology, regulation and governmental
involvement have created new legal challenges – and legal specialties - in how these industries are structured, financed and ultimately regulated. The result has been a growing misunderstanding and confusion about the scope of the work of our Section, and a consequent negative effect on our ability to attract in-house and outside lawyers in our natural practice areas. It has become clear to us that even active ABA members and many of its leaders do not fully understand the industries that we serve.

After considerable reflection over a period of years, our Section’s leadership concluded that we should update our name to the “Infrastructure and Regulated Industries Section” (or “IRIS”) to reflect and clarify that our Section is a home for lawyers who work in industries that support key public service-related, constructed infrastructure that is the backbone of our economy. It would also recognize the importance of regulation and government involvement in the setting of rates, assuring of access, and safety of these critical infrastructure industries. The proposed new name will more accurately describe the modern configuration of our industries, and will enable us to draw more effectively from a significantly larger pool of lawyers who practice in the industries we serve. This in turn will enhance our ability to serve the interests of our membership. By broadening our visibility to those who will recognize their areas of practice in our Section’s name, we expect to be able to attract a greater share of the lawyers that practice in our core areas, to the overall net membership gain of the ABA. We also expect to benefit from the name change in our marketing of Section publications, webinars, and other events.

In seeking this section name change, we are not seeking a change in our jurisdiction and intend to continue with our current financial level of general revenue funding. Other than the change in the name, the internal structure and bylaws of the Section would remain the same. In summary, in addition to better describing what we really do and the industries we serve today, we hope to attract more new members to the Section from both existing ABA members and from non-ABA members.

**APPROVAL PROCESS**

After consideration by and a report of the Long-Range Planning Committee in March 2014, and following lengthy discussions at the 2014 Fall Council Meeting, the Section Council reached a consensus and the motion to change the Section name was approved by the Section Council on March 19, 2015. The motion to approve the new name will be put before the Section membership at the Annual Business Meeting of the Section on Saturday, August 6, 2016. All necessary steps to change the Section bylaws to reflect the new name are underway.

**POST-APPROVAL PROCESS**

During our 100th Anniversary year, our Section will promote our new name while we celebrate this anniversary milestone in the life of our Section, which is the ABA’s third oldest Section. And, going forward we hope to introduce new generations of lawyers to the work of the ABA and our Section. We believe that this name change will serve the policy interests and the membership of our Section and of the ABA.
Thank you for your consideration of this request. If you have any questions, please contact me at dynda.thomas@squirepb.com, or our Section Director, Susan Koz at susan.koz@americanbar.org.

Respectfully submitted,

Dynda A. Thomas
Dynda A. Thomas, Section Chair
April 12, 2016
SPONSORS: Clyde J. "Butch" Tate II (Chair), Dwain Alexander II, William S. Aramony, Michelle Leatrice Raven, Danielle Reyes, Gregory L. Ulrich, Chloe Woods.

PROPOSAL: Amends Article 31, § 31.7 of the Constitution to expand the size of the Standing Committee to not more than ten members.

Amends §31.7 of the Constitution to read as follows (addition underlined):

§31.7 Legal Assistance for Military Personnel.

The Standing Committee on Legal Assistance for Military Personnel, which consists of not more than ten members, has jurisdiction over matters relating to legal assistance for military personnel and their dependents. This includes all civil legal matters related to military service, whether directly or incidentally, and whether arising during periods of active-duty service or following transition to civilian status. It shall foster the continued growth of the military legal assistance programs and promote the delivery of legal services to military personnel and their dependents and to persons accompanying the armed forces outside the United States, for their personal legal affairs (except those involving proceedings under the Uniform Code of Military Justice). It shall advocate for policies improving access to legal services and civil legal protections for military personnel and their dependents. It shall maintain close liaison with the Department of Defense, the Department of Homeland Security with respect to the U.S. Coast Guard, the Department of Veterans Affairs, the military services, bar associations, and appropriate committees of the Association to enhance the scope, quality and delivery of free or affordable legal services to eligible legal assistance clients.
REPORT

We, the undersigned members of the Standing Committee on Legal Assistance for Military Personnel (LAMP), propose amendment of the Standing Committee’s jurisdictional statement contained within the ABA Bylaws under Article 31, § 31.7.

At the 2015 ABA Annual Meeting, the House of Delegates approved an amendment to the LAMP Committee’s charter in the ABA Bylaws to make clear that all civil legal issues affecting servicemembers and their dependents arising during a term of active-duty service fall within the jurisdiction of the Standing Committee. The amendment further recognized that a servicemember’s separation from the military does not, on its own, end the Standing Committee’s interest in delivery of legal assistance to address legal matters rising from, or connected to, the military service, and thus the Standing Committee remains concerned about supporting those legal needs that carry over as military personnel transition into civilian life.

As a result of the approved amendment, the LAMP Committee’s charter now expressly encompasses all of those legal matters for which there is a direct relationship to military service irrespective of when they arise. Thus while the LAMP Committee’s membership had previously required expertise focused on legal assistance services for only those on active duty and their dependents, extension of the committee’s jurisdiction over legal matters arising during and after servicemembers’ transition to civilian status now requires the committee to have expertise in a wider range of legal areas, from VA benefits to employment law to the effects of post-traumatic stress, and many more. The committee has been, since its inception, constituted at the minimum number defined in the bylaws, currently at seven members. With the significantly higher level of activity undertaken by the committee and its growing staff over the past fifteen years, along with a more broadly defined mandate, there are growing demands upon the committee that can be effectively met only by more active and involved members.

In summary, expanding the LAMP Committee’s size from seven to ten will increase the depth and breadth of its expertise through its membership commensurate with the newly widened scope of its jurisdictional coverage, and it will also raise it to a membership size that is reflective of its stature within the Association. This bylaw change will thereby empower the ABA, though the LAMP Committee, to better carry out its mission to support the civil legal needs of military personnel and their families both during and after their time in service.

Respectfully submitted,

Clyde J "Butch" Tate II (Chair)
Dwain Alexander II
William S. Aramony
Michelle Leatrice Raven
Danielle Reyes
Gregory L. Ulrich
Chloe Woods

**PROPOSAL:**  Amends § 31.7 of the Bylaws to create a Standing Committee on International Trade in Legal Services

Amends §31.7 of the Bylaws to read as follows:

**Designation, Jurisdiction and Special Tenures of Standing Committees.** The designation, jurisdiction and special tenures of Standing Committees are as follows:

1. **Standing Committee on International Trade in Legal Services.** The Standing Committee on International Trade in Legal Services, which consists of twelve members, shall: 1) monitor the negotiations of international trade agreements that involve the United States and the provision of legal services; 2) coordinate the Association’s positions on issues relating to the access by U.S. lawyers to the legal services markets of other countries and access by lawyers from foreign jurisdictions to the U.S. legal services market; 3) advise the U.S. Government of relevant aspects of the negotiations; 4) develop policy recommendations for adoption by the House of Delegates; 5) assist other Association entities in the implementation of current Association policies relating to these issues; and 6) educate and engage in outreach to interested internal and external entities relating to the status of international trade agreement negotiations relevant to legal services and provide those entities with a mechanism to provide their input for consideration and study.

(Legislative Draft – Additions underlined; deletions struck through)
REPORT

This purpose of this amendment is to establish a Standing Committee on International Trade in Legal Services. The effect of the amendment would be to transition the existing Task Force on International Trade in Legal Services (“Task Force”), created by the Board of Governors in 2003, into a permanent entity.

The Task Force has been reviewed by the ABA Standing Committee on Scope and Correlation of Work (“Scope”) numerous times during its existence. The Scope Committee has consistently found that the Task Force “is active and not engaging in a function that unnecessarily overlaps with or duplicates the activities of other ABA entities” and has commended the Task Force for its “excellent work.” The Scope Committee included the following in its response to the Task Force after its most recent review:

Also during our review, Scope concluded the Task Force should consider changing its structure to a committee of the Association, such as, a standing or special committee. Scope believes such a change in structure should be considered, for the following reasons: the issues associated with globalization such as advising the U.S. Trade Representative, promoting American law and use of American lawyers abroad, and dealing with the issues that arise from foreign lawyers practicing in the United States are not going away in the foreseeable future; and a task force is created by the ABA Board of Governors to perform a short term assignment. (Letter dated January 12, 2015 from Scope Committee Chair Richard A. Soden to Task Force Chair David Tang).

For these reasons, and for the ongoing importance of these issues to the ABA and the U.S. legal profession, we urge adoption of this resolution to transition the Task Force to a Standing Committee.

History of the Task Force

The Task Force on GATT Negotiations Regarding Trade and Services Applicable to the Legal Profession (later referred to as the Task Force on GATS Legal Services Negotiations) was created by the Board of Governors in 2003, to be composed of six presidentially-appointed members, four of whom were to be designated representatives from the following ABA entities: Section of Administrative Law and Regulatory Practice; Section of Business Law; Section of International Law; and Section of Litigation. The other two positions were for at-large members. In August 2003, the Board increased the size of the Task Force from six members to eight members, in order to “to ensure that appropriate diversity is created and maintained among the current entity membership.”

In February 2007, the Board approved changing the name to the Task Force on International Trade in Legal Services (ITILS), to more accurately reflect the range of issues and initiatives that the Task Force was being asked to address in relation to multilateral and bilateral trade
negotiations that impact the U.S. legal profession. In June 2009, the Board approved then President-Elect Carolyn Lamm’s request to revise the jurisdictional statement of the Task Force to increase its membership from eight members to twelve members. The additional seats were designated for the president of the National Conference of Bar Presidents, a liaison to the Commission on Ethics 20/20, and two state bar association presidents. This constitutes the current structure of the Task Force. In addition, because of the global professional ethics and regulatory issues inherent in the matters under study by the Task Force, the Center for Professional Responsibility has been and continues to be an essential partner in the work of the Task Force.

The primary purpose of the Task Force has been to: monitor international trade negotiations and other initiatives that impact trade in legal services; educate and engage in outreach to interested entities relating to the status of international trade agreement negotiations and provide those entities with a mechanism to provide their input to the Association for consideration and study; and to serve a coordinating function for ABA entities on issues and activities related to trade in legal services and inbound/outbound market access.

**International Trade in Legal Services**

Trade negotiations impacting legal services have been and continue to be engaged in both bilateral and multilateral context. For example, the General Agreement on Trade in Services (GATS) is the first multilateral, legally enforceable agreement covering trade and investment in services. All members of the WTO are signatories to the GATS framework agreement and many have scheduled GATS commitments in various service sectors, including legal services. These negotiations involve two important elements: outbound market access (what kind of access U.S. lawyers may have to overseas markets) and inbound privileges (what kind of access foreign lawyers will have to the U.S. market).

In addition, negotiations on trade in legal services are also being increasingly pursued through other means and mechanisms. The U.S. now routinely includes trade in services, including legal services, in the negotiation of bilateral and multilateral Free Trade Agreements. The recently concluded Trans Pacific Partnership Agreement contains a professional services annex with a specific section on legal services that obligates governments who are party to the agreement to encourage their relevant regulatory bodies to consider a number of issues if they regulate or seek to regulate foreign lawyers and transnational legal practice. In addition, discussions on legal services are currently taking place among U.S. negotiators and their foreign counterparts as a part of the Transatlantic Trade and Investment Partnership negotiations and the Trade in Services Agreement negotiations.

In addition, under some existing FTAs, there are provisions requiring governments to encourage and facilitate private industry dialogue on legal services market access and qualification issues. Lastly, independent of governmental trade negotiations, several foreign bars have expressed an interest in engaging in direct bar-to-bar discussions on these issues. For each of these
situations, the Task Force has specific examples in which it has undertaken initiatives or been asked to provide assistance by U.S. government trade negotiators.

Within the ABA there are several entities that have significant interests in the substance of these issues and the process involved in the U.S. making commitments on legal services. The Sections of International Law, Business Law and Litigation, for example, have strong interests in outbound access for U.S. lawyers and law firms seeking to provide services to clients in foreign jurisdictions. The Section of Legal Education and Admissions to the Bar and the Center for Professional Responsibility have strong interests in ensuring that the federal government does not undertake actions that improperly intrude on the primary authority of the state supreme courts to regulate the qualifications, admissions, and discipline of U.S. lawyers and foreign lawyers who are permitted to practice in the manner set forth in state court rules and regulations.

The multi-entity representation provided by the structure of the Task Force has made it uniquely qualified to evaluate issues, share information, and solicit input from all of the interested groups in one forum. Prior to its creation, no single ABA entity existed to coordinate internal activities related to these issues. In addition to facilitating internal coordination on these issues, the Task Force also maintains active relationships with the Conference of Chief Justices, National Conference of Bar Presidents, National Conference of Bar Examiners, National Association of Bar Executives, and National Organization of Bar Counsel. Representatives of these organizations regularly participate in meetings, conference calls and other activities. In several instances the Task Force has have collaborated with representatives of those entities to distribute information about pending services negotiation proposals and to facilitate a coordinated response to the relevant government agencies. The continuity in these relationships is important given the complexity and sensitivity of these issues.

**Importance of this Issue to U.S. Legal Profession and ABA Members**

The ongoing globalization of commercial activity makes it imperative for U.S. lawyers and law firms to be able to provide advice and assistance to their clients wherever the clients need that assistance. The U.S. is the largest legal services market and the largest exporter of legal services in the world, with more than $9 billion in exports annually. ABA members, both individuals and law firms, have substantial interest in assuring access to overseas markets. However, many countries have regulations or trade barriers in place that prevent or put onerous restrictions on U.S. firms operations within their borders.

Through the Task Force, the ABA is engaged in activities to promote the elimination of these legal services market access barriers around the world, including through implementation of ABA policy calling for the U.S. government to negotiate access for U.S. lawyers in foreign jurisdictions similar to what is offered under the ABA Model Foreign Legal Consultant Rule. This work demonstrates to U.S. lawyer and law firm members (and potential members) that the ABA is working on their behalf to improve their ability to establish offices and structure relationships
to most effectively serve their clients in foreign markets. In addition, the Task Force serves as a forum to develop and communicate views of ABA membership to governmental entities responsible for negotiating issues relevant to regulation of the legal profession and market access for U.S. firms. The Task Force also provides a valuable service through monitoring and informing members, ABA entities and affiliated entities of ongoing developments in international trade negotiations that impact legal services.

Many of the Task Force’s activities also serve an educational function, informing ABA members on rules of practice in foreign countries and educating foreign lawyers on rules of practice in U.S. jurisdictions. In addition, the Task Force has actively worked to promote implementation of ABA policies and has offered materials and assistance to states to consider adopting ABA model rules and policies on inbound foreign lawyers. Adoption of these policies will help state bars and lawyer regulatory systems deal more effectively with challenges presented by the increasing globalization of the legal profession.

The adoption of this amendment to transition the existing Task Force to a Standing Committee will serve to recognize the value that a permanent entity brings to this critical work and will ensure that the ABA is able to continue to effectively represent the interests of its members in both inbound and outbound legal services market access.

Respectfully Submitted,

David K.Y. Tang
Darrell Mottley
Rew R. Goodenow
Glenn Lau-Kee
Don DeAmicis
Hon. Delissa A. Ridgway
Kenneth B. Reisenfeld
Edward Mullins
Robert E. Lutz
Carole Silver
Timothy Brightbill
Glenn P. Hendrix
Stephen P. Younger
Thomas G. Wilkinson, Jr.
Laurel S. Terry
Erik Wulff
Erica Moeser
Eugene Theroux
Hon. Gerald W. VandeWalle
William P. Smith
RESOLVED, That the American Bar Association House of Delegates concurs in the action of
the Council of the Section of Legal Education and Admissions to the Bar in making amendments
dated August 2016 to the following ABA Standards and Rules of Procedure for Approval of Law
Schools:

- Standard 304: Simulations Courses, Law Clinics, and Field Placements
- Standard 305: Other Academic Study
- Standard 307(a): Studies, Activities, and Field Placements Outside the United States
- Interpretation 311-1: Academic Program and Academic Calendar
Standard 304. SIMULATION COURSES, LAW CLINICS, AND FIELD PLACEMENTS

(a) A simulation course provides substantial experience not involving an actual client that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member, and (2) includes the following:

(i) direct supervision of the student's performance by the faculty member;

(ii) opportunities for performance, feedback from a faculty member, and self-evaluation;

and

(iii) a classroom instructional component.

(b) A law clinic provides substantial lawyering experience that (1) involves advising or representing one or more actual clients or serving as a third-party neutral, and (2) includes the following:

(i) direct supervision of the student’s performance by a faculty member;

(ii) opportunities for performance, feedback from a faculty member, and self-evaluation;

and

(iii) a classroom instructional component.

(c) A field placement course provides substantial lawyering experience that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a setting outside a law clinic under the supervision of a licensed attorney or an individual otherwise qualified to supervise, and (2) includes the following:

(i) direct supervision of the student’s performance by a faculty member or site supervisor;

(ii) opportunities for performance, feedback from either a faculty member or a site supervisor, and self-evaluation;

(iii) a written understanding among the student, faculty member, and a person in authority at the field placement that describes both (A) the substantial lawyering experience and opportunities for performance, feedback and self-evaluation; and (B) the respective roles of faculty and any site supervisor in supervising the student and in
assuring the educational quality of the experience for the student, including a clearly articulated method of evaluating the student’s academic performance;

(iv) a method for selecting, training, evaluating and communicating with site supervisors, including regular contact between the faculty and site supervisors through in-person visits or other methods of communication that will assure the quality of the student educational experience. When appropriate, a school may use faculty members from other law schools to supervise or assist in the supervision or review of a field placement program;

(v) a classroom instructional component, regularly scheduled tutorials, or other means of ongoing, contemporaneous, faculty-guided reflection; and

(vi) evaluation of each student’s educational achievement by a faculty member;

(vii) sufficient control of the student experience to ensure that the requirements of the Standard are met. The law school must maintain records to document the steps taken to ensure compliance with the Standard, which shall include, but is not necessarily limited to, the written understandings described in Standard 304(c)(iii).

(d) Credit granted for such a simulation, law clinic, or field placement course shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student.

(e) Each student in such a simulation, law clinic, or field placement course shall have successfully completed sufficient prerequisites or shall receive sufficient contemporaneous training to assure the quality of the student educational experience.

Interpretation 304-1

Interpretation 304-1

To qualify as an experiential course under Standard 303, a simulation, law clinic, or field placement must also comply with the requirements set out in Standard 303(a)(3).

Standard 305. FIELD PLACEMENTS AND OTHER ACADEMIC STUDY OUTSIDE THE CLASSROOM

(a) A law school may grant credit toward the J.D. degree for courses that involve student participation in studies or activities in a format that does not involve attendance at regularly scheduled class sessions, including, but not limited to, courses approved as part of a field placement program, moot court, law review, and directed research.

(b) Credit granted for such a course shall be commensurate with the time and effort required and the anticipated quality of the educational experience of the student.

(c) Each student’s educational achievement in such a course shall be evaluated by a faculty member. When appropriate a school may use faculty members from other law schools to
(d) The studies or activities shall be approved in advance and periodically reviewed following the school’s established procedures for approval of the curriculum.

(e) A field placement program shall include:

(1) a clear statement of its goals and methods, and a demonstrated relationship between those goals and methods and the program in operation;

(2) adequate instructional resources, including faculty teaching in and supervising the program who devote the requisite time and attention to satisfy program goals and are sufficiently available to students;

(3) a clearly articulated method of evaluating each student’s academic performance involving both a faculty member and the site supervisor;

(4) a method for selecting, training, evaluating, and communicating with site supervisors;

(5) for field placements that award three or more credit hours, regular contact between the faculty supervisor or law school administrator and the site supervisor to assure the quality of the student educational experience, including the appropriateness of the supervision and the student work;

(6) a requirement that each student has successfully completed sufficient prerequisites or receives sufficient training to assure the quality of the student educational experience in the field placement program: instruction equivalent to 28 credit hours toward the J.D. degree before participation in the field placement program; and

(7) opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection. Where a student may earn three or more credit hours in a field placement program, the opportunity for student reflection must be provided contemporaneously.

(f) A law school that has a field placement program shall develop, publish, and communicate to students and site supervisors a statement that describes the educational objectives of the program.

Interpretation 305-1

To qualify as a writing experience under Standard 303, other academic study must also comply with the requirement set out in Standard 303(a)(2). To qualify as an experiential course under Standard 303, other academic study must also comply with the requirements set out in Standard 303(a)(3).

Interpretation 305-1

Regular contact may be achieved through in-person visits or other methods of communication that will assure the quality of the student educational experience.
Interpretation 305-2

A law school may not grant credit to a student for participation in a field placement program for which the student receives compensation. This Interpretation does not preclude reimbursement of reasonable out-of-pocket expenses related to the field placement.

Interpretation 305-3

To qualify as an experiential course under Standard 303, a field placement must also comply with the requirements set out in Standard 303(a)(3).

Standard 307. STUDIES, ACTIVITIES, AND FIELD PLACEMENTS OUTSIDE THE UNITED STATES

(a) A law school may grant credit for (1) studies or activities outside the United States that are approved in accordance with the Rules of Procedure and Criteria as adopted by the Council and (2) field placements outside the United States that meet the requirements of Standard 305 and are not held in conjunction with studies or activities that are approved in accordance with the Rules of Procedure and Criteria as adopted by the Council.

Standard 311. ACADEMIC PROGRAM AND ACADEMIC CALENDAR

…

Interpretation 311-1

(a) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction for the purpose of Standard 311(a), the credit hours may include:

(1) Credit hours earned by attendance in regularly scheduled classroom sessions or direct faculty instruction;

(2) Credit hours earned by participation in a simulation course or law clinic in compliance with Standard 304;

(3) Credit hours earned through distance education in compliance with Standard 306; and

(4) Credit hours earned by participation in law-related studies or activities in a country outside the United States in compliance with Standard 307.

(b) In calculating the 64 credit hours of regularly scheduled classroom sessions or direct faculty instruction for the purpose of Standard 311(a), the credit hours shall not include any other coursework, including, but not limited to:

(1) Credit hours earned through field placements in compliance with Standard 304 and other study outside of the classroom in compliance with Standard 305;

(2) Credit hours earned in another department, school, or college of the university with which the law school is affiliated, or at another institution of higher learning;

(3) Credit hours earned for participation in co-curricular activities such as law review, moot court, and trial competition; and

(4) Credit hours earned by participation in studies or activities in a country outside the United States in compliance with Standard 307 for studies or activities that are not law-related.
1. **Summary of the Resolution**

   The amendments move field placements from Standard 305, which covers study outside the classroom, into Standard 304, which now covers all types of experiential courses identified in the Standards. The Interpretation that prohibits the granting of credit to a student for participation in a field placement for which the student receives compensation has been eliminated.

2. **Summary of the Issue that the Resolution Addresses**

   The resolution addresses the oversight of field placement programs in the *ABA Standards and Rules of Procedure for Approval of Law School*.

3. **Please Explain How the Proposed Policy Position will address the issue**

   The proposals amend the 2015-2016 *ABA Standards and Rules of Procedure for Approval of Law School*.

4. **Summary of Minority Views**

   Many who commented believed that the granting of credit for field placements would change the nature of the activity and that the supervising employer would be more likely to assign tasks that would benefit the employer and not benefit the student’s educational growth.
RESOLVED, That the American Bar Association approves the following program: Essex County College, Paralegal Studies Program, Newark, NJ.

FURTHER RESOLVED, That the American Bar Association reapproves the following paralegal education programs: Auburn University Montgomery, Legal Studies Program, Montgomery, AL; NorthWest Arkansas Community College, Paralegal Program, Bentonville, AR; Santa Ana College, Paralegal Studies Program, Santa Ana, CA; University of California UCLA Ext, Paralegal Training Program, Los Angeles, CA; Quinnipiac University, Legal Studies Program, Hamden, CT; Delaware Technical and Community College, Paralegal Program, Georgetown, DE; Widener University Delaware Law School, Legal Education Institute, Wilmington, DE; College of Lake County, Paralegal Studies Program, Grayslake, IL; Roosevelt University, Paralegal Studies Program, Chicago, IL; William Rainey Harper College, Paralegal Studies Program, Palatine, IL; University of Louisville, Paralegal Studies Program, Louisville, KY; Community College of Baltimore County, Paralegal Studies Program, Baltimore, MD; Missouri Western State University, Legal Studies Program, St. Joseph, MO; Middlesex County College, Paralegal Studies Program, Edison, NJ; Suffolk County Community College, Paralegal Studies Program, Selden, NY; Sinclair Community College, Paralegal Program, Dayton, OH; University of Toledo, Paralegal Studies Program, Toledo, OH; Ursuline College, Legal Studies Program, Pepper Pike, OH; Central Carolina Technical College, Paralegal Program, Sumter, SC; Midlands Technical College, Paralegal Studies Program, Columbia, SC; J. Sargeant Reynolds Community College, Paralegal Studies Program, Richmond, VA; and Casper College, Paralegal Program, Casper, WY.

FURTHER RESOLVED, That the American Bar Association withdraws the approval of the following paralegal education programs: Baker College of Clinton Township, Paralegal Studies Program, Clinton Township, MI; Maryville University, Legal Studies Program, St. Louis, MO; and Marymount University, Paralegal Studies Program, Arlington, VA, at the request of the institutions.

FURTHER RESOLVED, That the American Bar Association extends the terms of approval until the February 2017 Midyear Meeting of the House of Delegates for the following programs: University of Alaska Anchorage, Paralegal Certificate Program, Anchorage, AK; University of Arkansas Fort Smith, Paralegal Studies Program, Fort Smith, AR; Pima Community College, Paralegal Program, Tucson, AZ; Cerritos College, Paralegal Program, Norwalk, CA; Cuyamaca College, Paralegal Studies Program, El Cajon, CA; John F. Kennedy University, Legal Studies Program, Redwood City, CA; and Columbia College Chicago, Paralegal Studies Program, Chicago, IL.
Program, Pleasant Hill, CA; Miramar College, Legal Assistant Program, San Diego, CA; Mt.
San Antonio College, Paralegal/Legal Specialty Program, Walnut, CA; MTI College, Paralegal
Studies Program, Sacramento, CA; National University, Paralegal Studies Program, Los
Angeles, CA; San Francisco State University, Paralegal Studies Program, San Francisco, CA;
University of LaVerne, Legal Studies Program, LaVerne, CA; West Valley College, Paralegal
Program, Saratoga, CA; Arapahoe Community College, Paralegal Program, Littleton, CO;
Norwalk Community College, Legal Assistant Program, Norwalk, CT; Georgetown University,
Paralegal Studies Program, Washington DC; Wilmington University, Legal Studies Program,
New Castle, DE; Broward College, Legal Assisting Program, Pembroke Pines, FL; Florida South
Western State College, Paralegal Studies Program, Fort Myers, FL; Florida State College
Jacksonville, Paralegal Studies Program, Jacksonville, FL; Seminole State College of Florida,
aka Seminole Community College, Legal Assistant/Paralegal Program, Sanford, FL; South
University, Legal Studies/Paralegal Studies Program, Royal Palm Beach, FL; Athens Technical
College, Paralegal Studies Program, Athens, GA; South University, Legal Studies/Paralegal
Studies Program, Savannah, GA; Kirkwood Community College, Legal Assistant Program,
Cedar Rapids, IA; Loyola University Chicago, Institute for Paralegal Studies, Chicago, IL;
Northwestern College, Paralegal Studies Program, Chicago, IL; Southern Illinois University
Carbondale, Paralegal Studies Program, Carbondale, IL; Bowling Green Community College of
Western Kentucky University, Paralegal Studies Program, Bowling Green, KY; Morehead State
University, Paralegal Studies Program, Morehead, KY; Sullivan University, Institute for
Paralegal Studies, Lexington, KY; Herzing University, Legal Assisting/Paralegal Studies
Program, Kenner, LA; Tulane University, Paralegal Studies Program, New Orleans, LA; Elms
College, Legal Studies Program, Chicopee, MA; Oakland Community College, Paralegal
Program, Farmington Hills, MI; Oakland University, Paralegal Program, Rochester, MI;
Mississippi University for Women, Legal Studies Program, Columbus, MS; Central Piedmont
Community College, Cato Campus, Paralegal Technology Program, Charlotte, NC; Fayetteville
Technical Community College, Paralegal Technology Program, Fayetteville, NC; Montclair
State University, Paralegal Studies Program, Montclair, NJ; Columbus State Community
College, Paralegal Studies Program, Columbus, OH; Fortis College, Paralegal Program,
Centerville, OH; Mt. St. Joseph University, fka College of Mt. St. Joseph, Paralegal Studies
Program, Cincinnati, OH; University of Cincinnati–Clermont, Paralegal Technology Program,
Batavia, OH; Rose State College, Paralegal Studies Program, Midwest City, OK; University of
Oklahoma Law Center, Legal Assistant Education, Norman, OK; Bucks County Community
College, Paralegal Studies Program, Newtown, PA; Community College of Philadelphia,
Paralegal Studies Program, Philadelphia, PA; Greenville Technical College, Paralegal Program,
Greenville, SC; South University, Legal Studies/Paralegal Studies Program, Columbia, SC;
Brightwood College, fka Kaplan Career College, Paralegal Studies Program, Nashville, TN;
Pellissippi State Community College, Paralegal Studies Program, Knoxville, TN; South College,
Legal Studies and Paralegal Studies Programs, Knoxville, TN; Lee College, Paralegal Studies
Program, Baytown, TX; Texas State University, Legal Studies Program, San Marcos, TX; Salt
Lake Community College, Paralegal Studies Program, Salt Lake City, UT; Edmonds Community
College, Paralegal Program, Lynnwood, WA; Chippewa Valley Technical College, Paralegal
Program, Eau Claire, WI; Madison College, Paralegal Program, Madison, WI; Western
Technical College, fka Western Wisconsin Technical College, Paralegal Program, La Crosse,
WI; and Laramie County Community College, Paralegal Studies Program, Cheyenne, WY.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The resolution grants approval to one program, grants reapproval to twenty-two programs, withdraws the approval of three programs, and extends the term of approval of sixty-one programs.

2. **Summary of the issue which the Resolution Addresses**

The programs recommended for approval and reapproval in the attached report meet the Guidelines for the Approval of Paralegal Education Programs.

3. **Please Explain How the Proposed Policy Position will address the issue**

The programs recommended for approval and reapproval in this report have followed the procedures required by the Association and are in compliance with the Guidelines for the Approval of Paralegal Education Programs.

4. **Summary of Minority Views**

No other positions on this resolution have been taken by other Association entities, affiliated organizations or other interested group.
RESOLVED, That the American Bar Association urges the President of the United States and United States Senators to emphasize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for United States Circuit Judges and United States District Judges and to employ strategies to expand the diversity of the pool of qualified applicants, nominees and appointees to the U.S. District Court and U.S. Circuit Court of Appeals, including without limitation, the use of diverse merit selection panels.

FURTHER RESOLVED, That the American Bar Association urges the United States Circuit Courts of Appeals and the Circuit Judicial Councils to emphasize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for United States Bankruptcy Judges and to employ strategies to expand the diversity of the pool of qualified applicants, nominees and appointees to the Bankruptcy Court, including without limitation, the use of diverse merit selection panels.

FURTHER RESOLVED, That the American Bar Association urges the United States District Courts to emphasize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for United States Magistrate Judges and to employ strategies to expand the diversity of the pool of qualified applicants, nominees and appointees to United States Magistrate Judge positions, including without limitation, the use of diverse merit selection panels.

FURTHER RESOLVED, That the American Bar Association urges the Judicial Conference of the United States, federal courts, defender organizations, and the court support agencies to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the hiring process and to expand the diversity of the pool of qualified employees in the Judicial Branch of the United States.

FURTHER RESOLVED, That the American Bar Association urges its members to facilitate the selection of judges reflecting racial, ethnic, disability, sexual orientation, gender identity and gender diversity by identifying, encouraging, assisting, and mentoring qualified diverse candidates to seek selection as judges.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution urges the appropriate parties to recognize the importance of racial, ethnic, disability, sexual orientation, gender identity and gender diversity in the selection process for United States Circuit Judges and United States District Judges, United States Bankruptcy and Magistrate Judges, and for other qualified employees in the Judicial Branch of the United States, and to expand the diversity of the pool of qualified applicants, nominees and appointees, including without limitation, the use of diverse merit selection panels.

2. Summary of the Issue that the Resolution Addresses

Diversity of both the profession and the bench is critical to ensuring public trust and confidence in our system of justice, yet law is one of the least diverse professions in the nation. This resolution specifically focuses on increasing the diversity of the federal judiciary, so that the diversity of the federal judiciary can be equally measured against the diversity of the American people. For these measurements to be on par, there is a long road ahead.

3. Please Explain How the Proposed Policy Position will address the issue

The proposed policy position addresses the lack of diversity in the federal judiciary by drawing attention to the problem, using data as factual evidence, and by encouraging those responsible to take action by using appropriate tools and techniques to expand the diversity of the pool of qualified applicants, nominees and appointees to the bench, including without limitation, the use of diverse merit selection panels. The accompanying Report also calls for the Judicial Division of the ABA report back to the House of Delegates, through the appropriate committee, the diversity of the appointments to these benches every five years. By tracking the progress, invested parties will continue to be aware of the problem and work towards a solution.

4. Summary of Minority Views

There are no minority views known at this time.
RESOLUTION

RESOLVED, That the American Bar Association urges state and territorial election administrators and officials, to ensure the adoption and implementation, as soon as practicable, of statewide or territorial standards that provide clear criteria for determining what constitutes a valid vote when a hand count is required of paper and optical scan ballots.

FURTHER RESOLVED, That the American Bar Association encourages election officials in those jurisdictions that use “voter intent” standards to determine the outcome of a ballot, ensure adoption of explanatory rules, regulations and/or policies that clarify such standards as soon as practicable.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The proposed resolution would have the American Bar Association urge state and territorial election officials to ensure that uniform, state-wide or territorial-wide ballot counting guidance is in place as soon as practicable.

2. **Summary of the Issue that the Resolution Addresses**

   The proposed resolution seeks to provide a remedy to the failure of many states to comply with U.S. Supreme Court directive and federal law regarding voter intent. Such non-compliance will mean that if election contests in the 2016 general election are close and fall within the margin of requiring a recount there will be a failure to comply with the Equal Protection provisions of the U.S. Constitution.

3. **Please Explain How the Proposed Policy Position will address the issue**

   The proposed policy position will encourage the adoption of uniform, statewide ballot counting standards as a measure of ensuring compliance with Equal Protection provisions in our nation’s electoral process.

4. **Summary of Minority Views**

   No minority views have been identified in opposition.
RESOLVED, That the American Bar Association urges state, local, territorial and tribal jurisdictions to adopt court rules or legislation authorizing the award of class action residual funds to non-profit organizations that improve access to civil justice for persons living in poverty.

FURTHER RESOLVED, That before class action residual funds are awarded to charitable, non-profit or other organizations, all reasonable efforts should be made to fully compensate members of the class, or a determination should be made that such payments are not feasible.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges jurisdictions to adopt court rules or legislation that authorize non-profit organizations that improve access to civil justice for persons living in poverty as appropriate recipients of class action residual funds. It states that that before residual funds are awarded to such organizations, all reasonable efforts should be made to fully compensate members of the class, or it should be determined that such payments are not feasible.

2. Summary of the issue which the Resolution Addresses

Access to justice organizations should always be considered to be appropriate recipients of class action residual awards. It is not always clear, absent specific authorizing rules or statutes, that such awards are permissible.

3. Please Explain How the Proposed Policy Position will address the issue

The resolution clarifies that access to justice organizations are appropriate recipients of class action residual awards.

4. Summary of Minority Views

No opposing views have been expressed by other ABA entities or organizations as of the preparation of this summary.
RESOLVED, That the American Bar Association supports the following principles that relate to electronic voting in elections to federal office:

- National standards applied to all election software and firmware including open source code;
- National standards applied to all election hardware, including open design, and including the capability to audit all events (votes, maintenance, etc.);
- Creation of a secured voter-verified paper ballot at the time of voting, directly from the computer input device, i.e., DRE machine or optical scanner, with a copy provided to the voter before leaving the polling place. The paper ballot thus created is to be the official record of the vote cast;
- Unimpeded access to polling places, voting machine hardware, firmware, and software by approved and certified observers;
- Federal control and oversight of elections in the United States and its Territories;
- Federal penalties for tampering with registration and voting systems; and
- The capability of voting systems to undergo random audits, without having to meet criteria required to trigger a recount;

FURTHER RESOLVED, That the American Bar Association urges Congress and federal agencies to enact laws and adopt rules, regulations and policies that embody the aforementioned principles that relate to elections to federal office.
FURTHER RESOLVED, That the American Bar Association amend its Election Administration Guidelines and Commentary (2009) as follows (insertions underlined, deletions struck through):

7.2.b. Electronic voting machines should be required to have an immediately secured voter-verified paper record generated directly from the computer input device, i.e., DRE machine or optical scanner, of each vote or non-vote cast by the voter, with a copy provided to the voter before leaving the polling place, that will be used for audit purposes. The voter verified paper record should not contain any personally identifiable information, and is the official record of the vote cast.

7.6.d. A periodic random sample manual recount audits of the computer count should be a part of the canvass of votes cast, not restricted by recount criteria as enunciated in 8.0.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution is intended to achieve needed reform in elections to federal office in the United States and its Territories. Voting is a public function and a *sine qua non* of our democracy. Voting is internationally recognized as a human right, and a most basic right in our democracy. One purpose of the Resolution is to develop and standardize affordable open and scalable computerized election systems, including the registration process and the voting process, so as to maximize the security and reliability of election systems, and thereby establish public trust in those systems. All electronic equipment, including software, used in the elections process must be open and available to the public for inspection and monitoring.

The official record of the vote must be a paper ballot, verified by the voter and secured at the time the vote is cast.

The resolution establishes ABA policy, and urges legislation, that federal elections are a public function of the federal government, with non-partisan federal oversight and federal penalties for tampering, as opposed to individualized, and very often partisan, state and local control. Federal control of the election process for federal elective office appears to be permissible under Article I, Section 4 of the Constitution (along with Amendment XVII) for Representatives and Senators. There does not appear to be any prohibition on federal determination of the time, place, and manner of popular elections for the presidency and vice-presidency.

2. Summary of the Issue that the Resolution Addresses

There is near-universal agreement among experts that our present system of electing individuals to federal public office is seriously flawed by outdated and often unreliable equipment, including software, that is difficult to monitor and evaluate, even by experts; subject to manipulation through hacking by candidates or domestic or foreign third parties; the absence of non-partisan federal oversight; and cost pressures on local authorities in charge of elections.

3. Please Explain How the Proposed Policy Position will address the issue

The proposed policy, if incorporated into legislation, will maximize the degree to which surveillance of elections and monitoring for intrusions, including the voter registration process, is effective. It will lower the overall costs of elections and minimize the possibility of tampering, through the employment of standardized open source equipment to enable effective oversight by the public. It will establish federal control and oversight of elections to federal office and provide for the capability of federal penalties for infractions.
4. **Summary of Minority Views**

None known.

* Here, the term scalable refers to the ability to upgrade systems to keep pace with advances in computer and information technology and security.
RESOLVED, That the American Bar Association urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for lawyer referral services and their clients (“LRS clients”) for confidential communications between an LRS client and a lawyer referral service, when an LRS client consults a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for lawyer referral services and their clients (“LRS clients” or “LRS client”) for confidential communications between client and a lawyer referral service for the purpose of retaining a lawyer or obtaining an LRS legal advice from a lawyer. The new lawyer referral service-LRS client privilege established by these rules or legislation should be similar to the privilege that currently exists for confidential communications between attorneys and their clients.

2. Summary of the Issue that the Resolution Addresses

Lawyer referral services provide a public service in helping LRS clients to find legal representation (and attorneys find clients). In order to provide this service, lawyer referral services must first obtain information from each LRS client about their case or issue, to ensure that they are referred to the appropriate attorney or attorneys for their specific legal needs. In most states, it is unclear under existing statutory or case law whether any statutory or common law privilege would protect these confidential communications between an LRS client and a lawyer referral service, meaning that they are potentially subject to compelled discovery and disclosure. Lawyer referral services have been regularly questioned by LRS clients about this issue, and most are unable to reassure LRS clients that their communications are clearly privileged. This can hamper the kind of open communication required to make the right referral. Moreover, in recent years in a number of instances, litigants have sought discovery into such communications.

3. Please Explain How the Proposed Policy Position will address the issue

This resolution would urge federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for confidential communications between an LRS client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. It would enable lawyer referral services to reassure their clients and thereby maintain the kind of open communications required to make a good referral. It would also eliminate, or at least minimize, the risk that an opposing lawyer might subpoena documents or seek testimony from a lawyer referral service concerning its confidential communications with the other party.

3. Summary of Minority Views

None as of this writing.
RESOLUTION

RESOLVED, That the American Bar Association adopts the black letter of the *ABA Standards for Criminal Justice: Criminal Justice Mental Health Standards*, chapter seven of the ABA Standards for Criminal Justice, dated August 2016, to supplant the Third Edition (August 1984) of the *ABA Criminal Justice Mental Health Standards*. 
AMERICAN BAR ASSOCIATION

Fourth Edition of the

CRIMINAL JUSTICE STANDARDS

ON

MENTAL HEALTH

(Encompassing proposed revisions to the
Third Edition approved in 1984)

Presented by the
CRIMINAL JUSTICE SECTION
for Adoption by the House of Delegates
Annual Meeting
August 2016

CRIMINAL JUSTICE STANDARDS

ON

MENTAL HEALTH
PART I: THE CRIMINAL JUSTICE SYSTEM AND THE MENTAL HEALTH SYSTEM

Standard 7-1.1. Terminology

(a) Unless otherwise specified, these Standards adopt the definition of “mental disorder” found in the current Diagnostic and Statistical Manual of the American Psychiatric Association.* In the settings addressed by the Standards, mental disorder is most likely to encompass mental illnesses such as schizophrenia, bipolar disorder, and major depressive disorders; developmental disabilities that affect intellectual and adaptive functioning; and substance use disorders that develop from repeated and extensive abuse of drugs or alcohol or some combination thereof.

(b) “Mental health professional,” as used in these Standards, includes psychiatrists, psychologists, social workers and psychiatric nurses and other clinicians with expertise in the evaluation and treatment of mental disorders.

(c) “Mental health evaluation,” appearing throughout the Standards as “evaluation,” means an evaluation by a mental health professional of an individual accused of, charged with, or convicted of a criminal offense or detained by the police for the purpose of assessing:

i. mental competence, as defined in (f),

ii. mental state at the time of the offense as it relates to the insanity defense and other criminal responsibility issues, including mitigation at sentencing,

iii. risk for reoffending (referred to as “risk assessment” herein) or

iv. treatment needs.

(d) “Mental health treatment,” appearing throughout the Standards as “treatment,” includes but is not limited to the appropriate use of psychotropic medications, habilitation services, assertive community treatment, supported employment, family psychoeducation, self-

* The current edition of the Diagnostic and Statistical Manual, DSM-5, defines mental disorder as “a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.”
management, and integrated treatment for co-occurring mental disorder and substance abuse.

(e) “Mental health facility” refers to a facility designated for treatment of individuals with mental disorder, such as public and private mental and medical hospitals, community mental health centers, and crisis intervention units, but not including jails or prisons. A “forensic” mental health facility is a secure government facility reserved for individuals who have been charged with or convicted of crime.

(f) “Mental competence,” appearing throughout the Standards as “competence,” is defined in detail in Parts IV and V of these Standards, but at a minimum requires present understanding of the likely consequences of a particular course of action. A valid “assent” requires only this minimal level of competence, accompanied by an affirmative indication of agreement with a particular course of action, after an explanation of the likely consequences of the action.

Standard 7-1.2. Responding to persons with mental disorders in the criminal justice system

(a) Officials throughout the criminal justice system should recognize that people with mental disorders have special needs that must be reconciled with the goals of ensuring accountability for conduct, respect for civil liberties, and public safety.

(b) Criminal justice officials should work with community mental health treatment providers and other experts to develop valid and reliable screening, assessment, diversion, and intervention strategies that identify and respond to the needs of individuals with mental disorder who come into contact with the justice system, whether the setting is traditional criminal court, problem-solving court, a diversion program, or post-adjudication supervision and monitoring.

(i) When appropriate, services should be configured to divert people with mental disorders from arrest and criminal prosecution into treatment, consistent with the [draft ABA Diversion Standards].

(ii) Court systems should consider establishing special dockets for defendants with mental disorders, consistent with the [draft ABA Specialized Courts Standards].

(iii) Criminal justice officials should consider consulting mental health professionals knowledgeable about the possible impact of culture, race, ethnicity, and language on mental health in designing
strategies to respond to persons with mental disabilities in the
criminal justice system.

(c) Services should be available within correctional and mental health
facilities to facilitate both evaluation and treatment during incarceration
and planning for treatment upon release.

Standard 7-1.3. Roles of mental health professionals in the criminal justice
process

(a) Mental health professionals serve the administration of criminal justice by:

(i) Evaluating and offering legally relevant expert opinions and
testimony about a particular person’s past, present or future mental
or emotional condition, capacities, functioning or behavior, and
about the effects of interventions, treatments, services or supports
on the person’s condition, capacities, functioning or behavior
(evaluative expert role);

(ii) Offering opinions and testimony, with or without an evaluation,
within their respective areas of expertise concerning present
scientific or clinical knowledge that is relevant to a criminal case
(science expert role);

(iii) Providing consultation about strategy to the prosecution or defense
(consultative role);

(iv) Providing treatment for individuals charged with or convicted of
crimes (treatment role).

(v) Providing consultation with the courts, the bar, correctional
agencies, legislatures and other stakeholders aimed at establishing
appropriate and effective responses to individuals with mental
disorder who are involved in the criminal justice system (policy
role).

Because these roles involve differing and sometimes conflicting
obligations and functions, the nature and limitations of each should be
clarified by mental health professionals, courts, attorneys, and criminal
justice agencies. The professional's performance within these roles should
be limited to the individual professional's area of expertise and, while
responsive to legal obligations, should be consistent with that
professional's ethical principles.

(b) Evaluative expert role. When evaluating the condition, capacities,
functioning or behavior of a person involved in the criminal justice
system, the professional, no matter by whom retained, has an obligation to
make a thorough and impartial assessment based on sound evaluative
methods and to reach an objective opinion on each specific matter referred
for evaluation. The qualifications of a professional to serve as a court-
appointed evaluator are set out in Standard 7-3.9(a). The qualifications of
a professional to offer expert testimony about a person’s mental or
emotional condition, capacities, functioning or behavior are set out in
Standard 7-3.9(b). Disclosure of information obtained during the
evaluation is governed by limitations set forth in Standards 7-3.2, 7-3.4(b)
& (c), and 7-3.7 and presentation of expert testimony is governed by
Standard 7-3.11.

(c) Scientific expert role. When offering expert opinions and testimony
concerning scientific or clinical knowledge, the witness, no matter by
whom retained, should function impartially within the professional’s area
of expertise. The qualifications of a witness to offer expert testimony on
present scientific or clinical knowledge are established in Standard 7-
3.9(c).

(d) Consultative role. Mental health professionals serving as consultants to
the prosecution or defense have the same obligations and immunities as
any member of the prosecution or defense team, except as may be limited
by law.

(e) Treatment role. When providing treatment for a person charged with or
convicted of a crime, the obligations a mental health professional owes a
patient and society derive primarily from those arising in the ordinary
treatment relationship. Correctional and behavioral health agencies,
facilities and programs should respect that professional relationship to the
maximum extent consistent with public safety and sound institutional
management. When establishing a therapeutic relationship, mental health
professionals should advise the person of known limitations on the
professional relationship arising from the person’s involvement in the
criminal process or placement in an institutional setting.

(f) Policy role. Mental health professionals have at their disposal a wealth of
empirical and practical information about the nature of mental disorders,
the methods of assessing the treatability of and the risk presented by
people with mental disorder, the effectiveness of treatment programs, and
the operation of the mental health system. This knowledge can help
policymakers make informed judgments in enacting statutes, regulations
and guidelines that will improve the criminal justice system’s treatment of
people with mental disorder. Mental health professionals should be
couraged to provide this information to the relevant stakeholders
through testimony, contributions to the legal literature, formal and
informal consultation, and other mechanisms.
The prosecutor and defense counsel should respect the mental health professional's professional obligations, whatever role the professional is serving, and as early as possible ascertain how such obligations might affect the legal process. Attorneys should not attempt to compromise either a mental health professional’s legal obligations (by, for instance, knowingly encouraging an expert to violate a statutory reporting requirement) or ethical obligations (by, for instance, knowingly providing misleading information to an evaluator, or refusing to pay an expert unless favorable conclusions are reached).

**Standard 7-1.4. Roles of the attorney representing a defendant with a mental disorder**

(a) Consistent with the ABA Resolution on Comprehensive Criminal Representation, attorneys who represent defendants with mental disorders should provide client-centered representation that is inter-disciplinary in nature. These attorneys should be familiar with local providers and programs that offer mental health and related services to which clients might be referred in lieu of incarceration, in the interest of reducing the likelihood of further involvement with the criminal justice system.

(b) Attorneys who represent defendants with mental disorders should work particularly closely with their clients to ensure that the clients understand their options. Attorneys should be prepared to deal with difficulties in communication that can result from the client’s mental disorder or from transfers to a different locale necessitated by treatment needs.

(c) Attorneys who represent defendants with mental disorders should explore all mental state questions that might be raised, including whether the client’s capacities at the time of police interrogation bear on the admissibility or reliability of any incriminating statements that were made, whether the client is competent to proceed at any stage of the adjudication, and whether the defendant’s mental state at the time of the offense might support a defense to the charge, a claim in mitigation of sentence, or a negotiated disposition.

(d) Attorneys who represent defendants with mental disorders should seek relevant information from family members and other knowledgeable collateral sources. Attorneys should share information about their clients with family members and knowledgeable collateral sources only with their clients’ assent, and in a way that does not compromise the attorney-client privilege.

(e) Attorneys who represent defendants in specialized courts should be familiar with and abide by the [draft ABA Specialized Court Standards]. Because a defendant may relinquish substantial rights in a specialized
court, the attorney’s role as counselor is particularly important in this setting.

Standard 7-1.5. Role of the judge and prosecutor in cases involving defendants with mental disorders

(a) Judges and prosecutors should consider treatment alternatives to incarceration for defendants with mental disorders that might reduce the likelihood of recidivism and enhance public safety.

(b) Courts and prosecutor offices should facilitate meetings among community organizations interested in assuring that services are provided to justice-involved persons with mental disorders, including local law enforcement agencies, correctional authorities, and the bench and bar, as well as treatment providers, representatives of the public mental health authority, professional organizations, and other community leaders and governmental officials.

(c) Courts and prosecutor offices that help create diversion programs or specialized courts should be guided by [the draft ABA Standards on Diversion and the Draft ABA Standards on Specialized Courts].

(d) When making charging or dispositional decisions about a defendant who has a mental disorder, judges and prosecutors should consider referring the defendant for treatment, either voluntarily or, if appropriate, pursuant to existing law relating to involuntary hospitalization or mandated outpatient treatment.

(e) In determining which defendants should be selected for participation in diversion programs or specialized courts and which forms of intervention to use, judges and prosecutors should, whenever possible, rely on evidence-based practices, including valid and reliable appraisals of relevant risk and treatment needs.

Standard 7-1.6. Joint professional obligations for improving the administration of justice in criminal cases involving individuals with mental disorders

(a) National, state, and local judicial, legal, and mental health agencies and professional organizations should work cooperatively to monitor the interdependent performance within the criminal process of their members and constituents, and to improve the overall quality of the administration of justice in criminal cases involving mental health issues, including the quality and availability of services for justice-involved individuals with treatment needs.
Appropriate professional organizations and governmental agencies, including licensing and accreditation bodies, should establish programs and evidence-based practices, including peer review, for monitoring the performance of mental health professionals participating in the criminal process. Existing professional ethics boards and committees should develop specific criteria and special review procedures designed to address the ethical questions that may arise when mental health professionals participate in the criminal process.

(c) Appropriate professional, scientific, and governmental organizations should sponsor and disseminate the results of empirical research concerning:

(i) the validity and reliability of mental health evaluations employed in criminal cases;

(ii) the development of standardized protocols for conducting evaluations in criminal cases;

(iii) the application and practical effect of substantive rules and procedures in cases involving people with mental disorder;

(iv) the development of programs and services for individuals with mental health conditions, including diversion from arrest and prosecution to mental health treatment, treatment during periods of correctional confinement, and transition from correctional confinement to treatment post-release; and

(v) the quality and impact of participation by mental health professionals in the criminal process.

Standard 7-1.7. Education and training

(a) Interdisciplinary cooperation. Judicial, legal, and mental health professional associations, organizations, and institutions at national, state, and local levels should cooperate in promoting, designing, and offering basic and advanced education and training programs addressing the identification of and responses to individuals with mental disorders involved in or at risk of becoming involved in the criminal justice system. Such programs should include a focus on developing strategies to facilitate diversion from the criminal justice system to the community mental health treatment system before and after arrest, adjudication, and conviction. Such education and training programs should be offered to audiences working in both the criminal justice and mental health systems, including judges, attorneys, mental health professionals, and to students and trainees within these disciplines.
(b) Lawyers.

(i) Law schools should provide the opportunity for students, as a part of their formal legal education, to become familiar with the issues raised in these Standards. In addition to the relevant law, these issues might include the nature and prevalence of mental disorder, methods of screening for and identification of individuals with mental disorders who are involved in the justice system, risk assessment, problem-solving strategies (including jail diversion programs and mental health courts), the role of mental health professionals in the justice system, and the essential elements of a comprehensive system of care.

(ii) Bar associations, law schools, and other organizations responsible for providing continuing legal education should develop and regularly conduct programs offering advanced instruction on the topics described in (b)(i), and should be tailored to local needs and resources. Prosecutors, public defenders, and other attorneys who specialize in, or regularly practice, criminal law should participate in these programs.

(c) Judges. Each jurisdiction's highest appellate tribunal or its judicial supervisory authority with responsibility for continuing judicial education should develop and regularly conduct education and training programs on the topics identified in (b)(i). Additionally, such programs should include strategies for presiding over judicial proceedings involving defendants or witnesses with mental disorders, methods of identifying and communicating with participants in the courtroom who have a mental disorder, and the role of judges in criminal justice/mental health collaborations. Judges who preside over criminal proceedings should participate in these programs.

(d) Mental health professionals.

(i) Professional and graduate schools that train mental health professionals should afford the opportunity for students and trainees to become familiar with the issues concerning the participation of mental health professionals in the criminal process and the potential involvement of individuals with mental disorders in the criminal justice system.

(ii) These professional and graduate schools should also provide advanced instruction for students and trainees who desire to meet the minimum criteria established by Standard 7-3.9(a) for qualifying as court-appointed evaluators and by Standard 7-3.9(b) for qualifying as expert witnesses testifying about a person's mental condition.
(iii) Professional and graduate schools and other appropriate organizations, including governmental agencies having responsibility for continuing education for and licensure or certification of mental health professionals, should develop and regularly conduct programs offering instruction on the participation of such professionals in the criminal process designed to:

(A) enable those professionals to meet the minimum criteria established by Standard 7-3.9(a) for qualifying as court appointed evaluators and by Standard 7-3.9(b) for qualifying as expert witnesses testifying about a person's mental condition; and,

(B) inform all participants of developments in law and criminal practice, including problem-solving strategies such as diversion programs and mental health courts, in order to improve the competence of those who play scientific, evaluative, consultative, treatment, or policy-making roles in the criminal process. Mental health professionals who participate in the criminal process should enroll in these programs.

(e) These Standards should be included among the instructional materials used in all of the training described in this Standard. Judges, lawyers, mental health professionals and their professional organizations should disseminate these Standards widely to policy makers and others responsible for improving services for individuals with mental disorders who are involved in the criminal justice system and to representatives of the media investigating matters concerning this population or the systems they populate.
PART II. LAW ENFORCEMENT AND CUSTODIAL ROLES

Standard 7-2.1. Specialized training and crisis intervention strategies

(a) All law enforcement agencies and detention facilities should provide specialized training to their personnel to assist them in identifying and responding to emergency incidents involving persons with mental disorders. Qualified mental health professionals and consumers of mental health treatment and their families should be involved in curriculum preparation and training.

(b) As an adjunct to training, all law enforcement agencies should promulgate written policies detailing department procedures for intervening in emergency situations involving persons with mental disorders.

(c) Where resources allow, law enforcement agencies should establish specialized police response teams, consisting of officers who have been trained in responding to emergency situations involving individuals with mental disorders. Police dispatchers should be trained to alert these teams whenever a crisis develops requiring police response.

(d) Law enforcement agencies should develop memoranda of understanding with local mental health authorities regarding the availability of specialized police response teams, crisis beds, and other treatment services available for individuals the police encounter who require prompt referral for evaluation or treatment. These memoranda should specify convenient locations where an officer may transport an individual needing attention.

(e) All custodial personnel, whether civilian or sworn, as well as dispatchers and other personnel who are involved in interventions should receive training in identifying and responding to the symptoms and behaviors, including self-injurious behavior, associated with mental disorders. Emphasis should be placed on those symptoms and behaviors that arise or are aggravated by incarceration, particularly as they relate to suicide prevention. Explicit guidelines for responding to emergency situations, providing first aid, and preventing individuals from harming themselves should be published and made available to all facility personnel.

Standard 7-2.2. Preference for voluntary law enforcement disposition
(a) Department guidelines should authorize, but not require, law enforcement officers with appropriate training to provide assistance to any person with mental disorder who, in the officer’s discretion, requires care and assents to such care. The guidelines should stress that even where involuntary detention is permitted under Standard 7-2.3 officers should seek a voluntary disposition whenever feasible and appropriate.

(b) Voluntary disposition may consist of referral to a mental health facility but may also involve alternatives to treatment, such as summoning the assistance of the person's friends or family.

Standard 7-2.3. Law enforcement detention of people with mental disorders for purposes of evaluation and treatment

(a) Authority for law enforcement officers to take people with mental disorders into custody for purposes of referral for evaluation or treatment should be statutorily defined and limited to circumstances in which an officer has probable cause to believe that the person has committed a criminal offense or meets criteria for emergency evaluation under applicable state law. Law enforcement agencies should promulgate written procedures to guide the exercise of this authority.

(b) Departmental guidelines should stipulate that when custodial disposition is appropriate under (a), police should:

(i) be appropriately trained in crisis intervention or utilize, whenever feasible, the services of mental health professionals to assist them in effecting custody of individuals with mental disorders in emergency situations, and

(ii) use only the physical control necessary to effect such custody, taking into consideration the obligation of law enforcement officers to protect the person, themselves, and others from bodily harm.

(c) Law enforcement officials and administrators of treatment facilities in each locality should cooperate in developing joint guidelines and policies regarding the admission of persons in police custody to mental health facilities for appropriate evaluation or treatment. These guidelines should be widely disseminated to law enforcement, mental health professionals,
and mental health facility personnel. The guidelines should require law enforcement officials to notify administrators and other appropriate officials when facility officials decline to accept a person in police custody for evaluation or treatment.

(d) Law enforcement officials and administrators of treatment facilities should periodically conduct a joint review of such guidelines and policies to evaluate performance and effect operational changes and improvements.

Standard 7-2.4. Custodial processing of persons with mental disorders by law enforcement officers

(a) When arrest of an individual with a mental disorder is based exclusively on minor non-violent criminal behavior, law enforcement officers should follow one of the following options:

(i) in cases where the law enforcement officer reasonably believes that the mental disorder did not contribute to the crime or is not serious, processing the person in the same manner as any other criminal suspect;

(ii) facilitating a voluntary disposition under Standard 7-2.2, or

(iii) immediately transporting the person to an appropriate facility for evaluation and treatment under Standard 7-2.3.

Disposition under (ii) and (iii) does not preclude prosecution.

(b) When a person has been arrested for a crime not covered by Standard 7-2.4(a), law enforcement officers should process the person in the same manner as any other criminal suspect notwithstanding the fact that the arresting officer has reasonable grounds for believing that the person's behavior meets statutory and departmental guideline requirements for emergency detention for mental evaluation. In such cases, however, law enforcement officers should notify custodial personnel as required in 7-2.5 unless, in the officers’ judgment, the need for mental health intervention is so urgent that the evaluation required in 7-2.5 would be insufficiently timely and immediate transfer to a mental health facility under 7-2.3(a) is necessary.
Upon initial presentation to the mental health facility, detention facility, the prosecutor or the court, the arresting officer should reveal fully those facts which suggest that the arrestee has a mental disorder and is in need of evaluation or treatment and should document the relevant information for reference in future proceedings.

Consistent with Standard 7-5.4, law enforcement officials who are considering interrogation of a detained person under this Standard should recognize that persons with mental disorders may be unusually susceptible to persuasion and should be alert to the possibility that official conduct may be more likely to constitute impermissible coercion or result in an invalid waiver of rights when an individual with mental disorder is questioned.

Standard 7-2.5. Obligations of custodial personnel to detainees

(a) Custodial personnel should ensure that treatment services are available to detainees. To this end, and pursuant to the provisions of Standard 7-2.1, training for all custodial personnel, and especially for personnel responsible for processing newly detained persons, should include instruction in the identifying persons with mental disorder.

(b) Custodial personnel should screen all detained individuals upon intake for symptoms or behaviors indicative of a mental disorder and, if such symptoms are observed, should promptly report those observations to the official in charge of detention at the holding facility. Such a report should also be made at any other time custodial personnel observe, or are told by the arresting officer about, a detainee whose conduct or demeanor is indicative of a mental disorder and whose behavior is self-injurious or is indicative of the possibility of suicide. Upon receiving such a report, the official in charge, after promptly confirming the need to do so, should summon a mental health professional to provide emergency evaluation and treatment, pursuant to Standard 7-2.6.

(i) Defense counsel should be notified of the evaluation results, whether the evaluation takes place before or after counsel’s appointment. The court and the prosecutor should be notified of the fact of the evaluation and treatment, without reference to any findings or opinions resulting from the evaluation or treatment.
When the mental health professional determines that a confined person requires immediate evaluation or treatment not available in the holding or detention facility, the detainee should be transferred to a facility capable of providing such services in accordance with Standard 7-2.6.

If treatment or transfer does not occur pursuant to Standard 7-2.6 and the person is subsequently discharged from custody, custodial personnel should arrange necessary referrals for mental health treatment and related services (including housing if necessary). If a detainee is believed to meet criteria for civil commitment, custodial officials should initiate proceedings for the detainee’s commitment prior to discharge.

**Standard 7-2.6. Treatment of detainees; voluntary and involuntary transfer; notice to counsel**

(a) A detainee who in the opinion of a mental health professional who has evaluated the detainee assents, as defined in Standard 7-1.1(f) (i.e., understands the nature and purpose of a recommended treatment and agrees to such treatment), may be treated in the detention or holding facility or may be transferred to a treatment facility in conformity with the statutes or rules governing voluntary treatment and hospitalization. If treatment takes place in the detention or holding facility, custodial personnel should endeavor to maintain any treatment the detainee was receiving at the time of detention.

(b) If a detainee lacks the capacity to assent to recommended treatment or transfer to a treatment facility as defined in paragraph (a), treatment or transfer may be provided only if:

(i) a court has ordered treatment to restore the detainee’s competence pursuant to Standard 7-4.10(b); or

(ii) a court or state law has authorized treatment or transfer; or

(iii) an administrative panel composed of the treating professional and another qualified treatment professional find that the detainee is experiencing extreme emotional distress or deterioration of functioning that requires immediate treatment in the detention or holding facility or in a treatment facility and that the proposed
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treatment is likely to stabilize the detainee’s condition, is the least intrusive method of doing so, and is medically appropriate. When treatment is provided pursuant to this provision, the continued need for treatment beyond [15 days] should be subject to judicial review under procedures prescribed by statute.

(c) If a detainee who has the capacity to consent to treatment or transfer as defined in paragraph (a) refuses treatment or transfer, treatment or transfer may be provided only if a court has:

(i) ordered treatment to restore the detainee’s competence pursuant to Standard 7-4.11(b); or

(ii) authorized treatment or transfer pursuant to the jurisdiction’s civil commitment law.

(d) The director of the detention or holding facility should notify the detainee's attorney and the prosecuting attorney whenever the detainee is transferred to a mental health or medical facility; when possible, this notice should precede the decision to transfer.

(e) Information obtained during the course of the evaluations or treatment described in this Standard is admissible in subsequent criminal proceedings only as provided in Standard 7-3.2(a).

Standard 7-2.7. Law enforcement and custodial records of contacts with persons with mental disorders

(a) Records of significant contacts with persons with mental disorders who are not charged with a crime should be filed separately from arrest records and should be subject to a high degree of confidentiality.

(b) Records of mental health treatment provided to the detainee should be maintained separately from other records pertaining to the detainee, and access to them should be limited to the professionals providing treatment, the detainee's attorney, and the detainee except as otherwise provided. Custodial personnel, including supervisory personnel, should not examine these records without prior authorization of the detainee or the detainee's attorney.
Detainees’ access to treatment records maintained by a detention facility should be governed by rules similar to those applicable to patient access to treatment records maintained by other health institutions.
PART III. EVALUATIONS AND EXPERT TESTIMONY

Standard 7-3.1. Authority to obtain mental health evaluations

(a) Pre-trial evaluations; when permitted.

(i) Law enforcement and prosecution authorities may not seek or obtain a mental health evaluation, as defined in Standard 7-1.1(c), unless the subject of the evaluation has been taken into custody or arrested.

(ii) Law enforcement and prosecution authorities may seek and obtain a pretrial evaluation of an individual who has been taken into custody or arrested only under the circumstances referenced in (b), (c), (d) and (e)(i) & (ii) below, or if authorized by the individual’s attorney.

(b) Evaluations to determine whether treatment is warranted for individuals who have been taken into custody or arrested are governed by Standards 7.2-3 through 7.2-7.

(c) Evaluations of a defendant’s competence to proceed are governed by parts IV and V of this chapter.

(d) Evaluations of a defendant's mental condition at the time of the alleged crime:

(i) Defense-initiated evaluations are governed by Standard 7-6.4(a).

(ii) Prosecution-initiated evaluations are governed by Standard 7-6.4(b).

(e) Evaluations on dispositional issues:

(i) Evaluations of individuals found not guilty by reason of mental nonresponsibility [insanity] are governed by Standard 7-7.2.

(ii) Presentence evaluations of defendants convicted of non-capital crimes are governed by Standards 7-8.1 and 7-8.3.

(iii) Presentence evaluations of defendants charged with or convicted of capital crimes are governed by Standards 7-9.3.
Evaluations of prisoners being considered for voluntary or involuntary transfer to treatment facilities are governed respectively by Standards 7-10.2 and 7-10.3.

Standard 7-3.2. Uses of disclosures or opinions derived from pretrial evaluations or treatment

(a) Admissibility of disclosure or opinions in criminal proceedings. No statement made by or information obtained from a person, or evidence derived from such statement or information during the course of any pretrial evaluation or treatment described in 7-3.1, and no opinion of a mental health professional based on such statement, information, or evidence is admissible in any criminal proceeding in which that person is a defendant unless it is otherwise admissible and:

(i) it relates solely to the defendant's present competency to proceed and the use of such disclosure or opinion conforms to the requirements of Standard 7-4.7; or,

(ii) it is relevant to an issue raised by the defendant concerning the defendant's mental condition and the defendant introduces or intends to introduce the testimony of a mental health professional to support the defense claim on this issue.

(b) Duty of evaluator to disclose information concerning defendant's present mental condition that was not the subject of the evaluation.

(i) If, in the course of any evaluation, the evaluator concludes that the defendant may be incompetent to proceed, the evaluator should notify the defendant’s attorney and, if the evaluation was initiated by the court or prosecution, should also notify the court and prosecution.

(ii) If in the course of any evaluation, the evaluator concludes that the defendant presents an imminent risk of serious danger to him or herself or to another person or otherwise needs emergency intervention, the evaluator should take appropriate precautionary measures in accordance with applicable professional Standards and statutory reporting requirements.

Standard 7-3.3. Defense, prosecution and court access to mental health professional assistance and evaluation
The right to defend oneself against criminal charges includes an adequate opportunity to explore, through a defense-initiated evaluation, the availability of any defense to the existence or grade of criminal liability relating to defendant's or mental condition. Accordingly, for defendants who cannot afford such an evaluation, each jurisdiction should make available funds in a reasonable amount to pay for an evaluation by a qualified mental health professional or professionals selected by the defendant.

In such cases a defense attorney who believes that an evaluation could support a defense claim based on mental disorder should move for the appointment of a professional or professionals in an ex parte hearing. The court should grant the defense motion if such services are reasonably necessary for an adequate defense.

The court should grant a defense motion for a consultative expert, as defined in Standard 7-1.3(d), when the defense attorney can establish good cause that such an expert is necessary for an adequate defense.

Prosecution and court access to the defendant for purposes of an evaluation by a mental health professional depends upon the nature of the evaluation and is governed by the Standards referenced in Standard 7-3.1.

**Standard 7-3.4. Procedures for initiating evaluations**

The party that initiates an evaluation of defendant's mental condition should inform the evaluator of each matter to be addressed in the evaluation.

The attorney initiating an evaluation should obtain and provide to the evaluator all records and other information that the attorney believes may be of assistance in facilitating a thorough evaluation on the matter(s) referred. The attorney should also take appropriate measures to obtain and provide to the evaluator information that the evaluator regards as necessary for conducting a thorough evaluation on the matter(s) referred. If the evaluation is initiated by the court, both the defense attorney and the prosecutor should obtain and provide the information. Such information may include relevant medical and psychological records, social history, police and other law enforcement reports, confessions or statements made by defendant, investigative reports, autopsy reports, toxicological studies, and transcripts of pretrial hearings. If a record provided to the evaluator
contains highly sensitive information, either attorney may request a protective order limiting its further disclosure.

(c) Consistent with discovery laws, the rules of evidence, and the treatment needs of the defendant, reports resulting from the evaluations described in this Standard, and the records and other information relied on by mental health professionals preparing such reports, should be kept confidential until such time as the record is admitted into evidence. On the motion of either attorney, these reports and records should be sealed.

(d) An evaluation of the defendant's present competence should not be combined with an evaluation of the defendant's mental condition at the time of the alleged crime, or with an evaluation for any other purpose, unless the defendant so requests or, for good cause shown, the court so orders. If an evaluation addresses such discrete issues, a separate report should be prepared on each issue.

(e) When an evaluation is conducted pursuant to court order, that order should:

(i) identify the initiating party;

(ii) identify the purpose(s) of the evaluation;

(iii) describe the circumstances under which statements or other information obtained during the course of the evaluation, and any opinions of the mental health professional based on the evaluation, may be disclosed or used for any purpose in any criminal proceeding;

(iv) explain all applicable evidentiary privileges;

(v) specify whether the evaluator is required to prepare a written report, and, if so, delineate the scope, content, and disposition of the written report; and

(vi) direct that the defendant’s relevant health care records be released, upon request, to the attorney for the defendant or the mental health professional conducting the evaluation, with or without the defendant’s consent.
(f) Each jurisdiction should promulgate standard court orders designed to inform mental health professionals who conduct evaluations of the laws and procedures within the jurisdiction applicable to such evaluations.

**Standard 7-3.5. Procedures for conducting evaluations**

(a) The party that initiates the evaluation should inform the mental health professional conducting the evaluation and ensure that the professional understands:

(i) specific legal and factual matters relevant to the evaluation;

(ii) rules governing disclosure of statements or information obtained during the evaluation and governing disclosure of opinions based on such statements or information; and,

(iii) applicable evidentiary privileges.

(b) In any evaluation, whether initiated by the court, prosecution, or defense, the defense and the mental health professional conducting the evaluation have independent obligations to explain to the defendant and to ensure that the defendant understands to the extent possible:

(i) the purpose and nature of the evaluation;

(ii) the potential uses of any disclosures made during the evaluation;

(iii) the conditions under which the prosecutor will have access to information obtained and reports prepared, as provided in Standards 7-3.2 and 7-3.7; and,

(iv) the consequences of defendant's refusal to cooperate in the evaluation as provided for in Standard 7-6.4(b).

(c) Presence of attorneys during evaluations that result in reports to the prosecution or court.

(i) When the scope of the evaluation is limited to the defendant's competence to proceed, the defense attorney is entitled, but not required unless mandated by law, to be present at the evaluation. If present, the attorney should actively participate only if requested to do so by the evaluator.
When the scope of the evaluation is not limited to defendant's competence to proceed, the defense attorney should be present at the evaluation only at the request of the evaluator for reasons relating to the effectiveness of the evaluation. If present the attorney may actively participate only if requested to do so by the evaluator.

(ii) Attorneys who are present during an evaluation when psychological testing is administered should be aware that test content is protected by law and that disclosure of that content can undermine the test’s validity as a measure of a person’s functioning.

(iii) The prosecutor may not be present at any evaluation of defendant.

(d) Recording the evaluation

(i) The defense has no obligation to record a defense-initiated evaluation under Standard 7-3.3. However, if the defense records an evaluation of mental state at the time of the offense, copies should be provided promptly to the prosecution when the defendant gives notice, under Standard 7-6.3(b), of an intent to call the mental health professional who conducted the evaluation as an expert witness on the defendant’s mental condition at the time of the alleged offense.

(ii) Whenever feasible, recordings should be made of all court-ordered evaluations of defendants initiated by the prosecution or the court. Copies of such recordings should be provided promptly to the defense attorney and the prosecution.

(iii) Jails and other correctional facilities should maintain equipment that evaluators may use to make audio and video recordings of evaluations they conduct in such facilities. The equipment should be available, on request of the evaluator, for use in a private room when feasible and consistent with security requirements. Alternatively, facilities should allow evaluators to use their own equipment.

(iv) If an evaluation is recorded, video recording should be considered preferable to audio recording.
Joint evaluations should be encouraged. They should be permitted when agreed upon by the prosecutor and the defense attorney. A joint evaluation involves either an evaluation conducted by two or more behavioral health professionals or an evaluation by a mental health professional agreed on by both parties.

**Standard 7-3.6. Preparation and contents of written reports of mental evaluations**

(a) Promptly upon concluding the evaluation, the mental health professional should prepare a complete, written report, unless the professional is retained by the defendant and the defense attorney decides that the professional will not be called as an expert witness.

(b) Contents of written report.

(i) The written evaluation report should:

(A) identify the specific matters referred for evaluation;

(B) describe the procedures, tests, and techniques used by the evaluator;

(C) consistent with Standards 7-3.8 and 7-6.6, state the evaluator's clinical findings and opinions on each matter referred for evaluation and indicate specifically those questions, if any, that could not be addressed;

(D) identify the sources of information and present the factual basis for the evaluator's clinical findings and opinions; and,

(E) present the reasoning by which the evaluator utilized the information to reach the clinical findings and opinions.

(ii) Except as limited by Standard 7-3.7(a), the evaluator should include in the written report any statements or information that serve as necessary factual predicates for the clinical findings or opinions, even if the statements or information are of a personal or potentially incriminating nature.

(c) The attorney who requested the evaluation should not edit, modify, or otherwise revise the report in any way that would compromise the report’s integrity. However, after the report has been completed and submitted to
the attorney, the attorney may correspond in writing or converse with the mental health professional in order to clarify the meaning or implications of the evaluator's findings or opinions.

(d) Each jurisdiction should promulgate written guidelines regarding the law and procedures within that jurisdiction governing the preparation of written reports in order to inform mental health professionals serving as evaluators.

Standard 7-3.7. Discovery of written reports

(a) When the court has ordered a pretrial evaluation on any past or present competency issue, the evaluator should prepare a separate report on that issue even if other issues have also been referred for evaluation. The report should not contain information or opinions concerning either the defendant's mental condition at the time of the alleged offense or any statements made by the defendant regarding the alleged offense or any other offense. Upon satisfying itself that the report does not contain information or opinions that should have been excluded, the court should promptly provide copies to the prosecutor and to the defense attorney.

(b) When the defendant gives notice of an intent to rely on an expert,

(i) the defense should promptly provide to the prosecution all written reports on the issue in question prepared by any mental health professional whom the defendant intends to call as an expert witness. If the defendant intends to call an expert witness who has not previously prepared a written report, a written report conforming to Standard 7-3.6 (b) should be prepared and promptly provided to the prosecution.

(ii) the prosecution should promptly provide to the defense all information, including written reports prepared by mental health professionals, bearing on the issues addressed by the defense expert that have not already been provided through the discovery process.

(c) Upon a showing of good cause by the defendant, the court may order that the delivery of a report or reports be denied, restricted, or deferred until a time certain before trial. The court may order the defendant to promptly
107 disclose to the prosecutor a list of the sources of information relied upon in any report whose delivery has been denied, restricted, or deferred.

(d) Each jurisdiction should establish, by statute or court rule, detailed guidelines governing discovery of written reports prepared by mental health professionals.

Standard 7-3.8. Admissibility of expert testimony concerning a person's mental condition or behavior

(a) Expert testimony, in the form of an opinion or otherwise, concerning a person's past or present mental condition should be admissible whenever the testimony is based on and is within the specialized knowledge of the witness and will assist the trier of fact on an issue relevant to the adjudication.

(b) Expert testimony relating to the person's future mental condition or behavior, including risk of reoffending, should be admissible when relevant to any criminal proceeding or special commitment hearing if the testimony is within the specialized knowledge of the witness and is based on reliable techniques and practices, which may include consideration of:

(i) the clinical significance of the individual's history and current behavior;

(ii) scientific studies involving the relationship between specific behaviors and variables that are objectively measurable and verifiable;

(iii) the possible psychological or behavioral effects of proposed therapeutic or other interventions;

(iv) the factors that tend to enhance or diminish the likelihood that specific types of behavior could occur in the future, or

(v) the defendant’s performance on validated instruments for assessing risk and need only when administered, scored, interpreted and presented in accordance with scientific and professional standards.

(c) If the jurisdiction requires the evaluator to present his or her opinion on a question requiring a conclusion of law or a moral or social value judgment, the evaluator should use cautionary language to explain the
boundaries of the expert’s clinical expertise and the limitations of the opinion.

**Standard 7-3.9. Qualifications for evaluating and testifying mental health professionals**

(a) Court-appointed evaluators. No professional should be appointed by the court to evaluate a person's mental condition unless the court determines that the professional's qualifications include:

(i) sufficient professional education and clinical training as set out in Standard 7-3.10, as well as sufficient experience, to establish the clinical knowledge required for the specific type(s) of evaluation(s) being conducted; and,

(ii) sufficient forensic knowledge, gained through specialized training or an acceptable substitute therefor, necessary for understanding the relevant legal matter(s) and for satisfying the specific purpose(s) for which the evaluation is being ordered.

(b) Evaluators who testify. No witness should be qualified by the court to present expert opinion testimony on a person's mental condition unless the court determines that the witness:

(i) has sufficient professional education and clinical training as set out in Standard 7-3.10, as well as sufficient experience, to establish the clinical knowledge required to formulate an expert opinion; and,

(ii) has either:

(A) acquired sufficient knowledge, through forensic training or an acceptable substitute therefor, relevant to conducting the specific type(s) of mental evaluation actually conducted in the case, and relevant to the substantive law concerning the specific matter(s) on which expert opinion is to be proffered; or,

(B) has had a professional therapeutic relationship with the person whose mental condition is in question and will limit the testimony to matters concerning the defendant’s general mental condition as presented during the therapeutic relationship; and
(iii) has performed an adequate evaluation, including a personal interview with the individual whose mental condition is in question, relevant to the legal and clinical matter(s) upon which the witness is called to testify.

(c) Scientific experts. As indicated in Standard 7-1.3(b), expert testimony may involve issues of present scientific or clinical knowledge and may be presented by an expert who has not evaluated the defendant. No witness should be qualified by the court to present expert testimony on issues of present scientific or clinical knowledge unless the court determines that the witness:

(i) has a degree in an appropriate medical or scientific discipline; and,

(ii) has relevant clinical or research experience and demonstrated familiarity with current scientific or clinical information on the specific issue on which the witness is called to testify.

(iii) Professional credentials and general practical experience should not, in and of themselves, constitute a demonstration of expertise sufficient to warrant qualification as an expert witness on issues of present scientific or clinical knowledge.

Standard 7-3.10. Establishing minimum professional education and clinical training requirements for evaluators and expert witnesses; recommended requirements

(a) Every jurisdiction should establish, by statute, regulation, or court rule, minimum professional education and training requirements necessary to qualify persons for the performance of roles identified in Standard 7-3.9.

(b) In developing such minimum requirements, jurisdictions should take the following general factors into consideration:

(i) Necessary and desirable education and training requirements should differ according to the specific subject matter of the evaluation(s) being performed and the specific legal purpose(s) for which expert opinion is being solicited; and,

(ii) Sufficient flexibility should be provided to permit the courts to utilize persons who clearly demonstrate the requisite knowledge notwithstanding their lack of the formal education or training that may be specified in the requirements. However, experience in
performing evaluations or in testifying as an expert should not, by itself, constitute a sufficient demonstration of the requisite clinical knowledge.

(c) In establishing minimum professional and education and clinical training requirements, each jurisdiction should strive for the highest possible qualifications and should adopt the following recommended minimum requirements, their foreign equivalent, or such higher requirements as may be feasible and appropriate:

(i) When an evaluation concerns a person's competence to proceed and other mental conditions at the time of the evaluation or a person's need for treatment, evaluators and expert witnesses should be either:

(A) a licensed physician who has successfully completed at least two years of postdoctoral specialty training in a psychiatric residency program approved by the American Board of Psychiatry and Neurology (or one year of internship and one year of such residency training) or its foreign equivalent; or,

(B) a psychologist who has received a doctoral degree in psychology from an educational institution accredited by an organization recognized by the Council on Postsecondary Accreditation or its foreign equivalent, and who is licensed as a psychologist if the jurisdiction requires licensure; or,

(C) a clinical social worker who has received a master's degree in social work with an emphasis on clinical practice from an educational institution accredited by the Council on Social Work Education or its foreign equivalent, and who has completed a minimum of two years or three thousand hours of postgraduate supervised clinical experience in the diagnosis, assessment, and treatment of mental disorders in an appropriate clinical setting, and who is licensed or certified as a social worker if the jurisdiction requires licensure or certification; or,

(D) a clinical specialist in psychiatric nursing or a psychiatric nurse, who has received a master's degree in psychiatric nursing from an educational institution accredited by an
organization recognized by the National League of Nursing
or its foreign equivalent, and who is licensed or certified if
the jurisdiction requires licensure or certification for the
respective discipline.

(ii) When an evaluation concerns a person's mental condition at the
time of an alleged crime, or a person's future mental condition or
behavior when these issues arise within a sentencing proceeding or
a special commitment proceeding held pursuant to Standard 7-4.14
or Standard 7-7.4, the evaluator or expert witness should be either:

(A) a licensed physician who has completed the postdoctoral
specialty training in a psychiatric residency program
approved by the American Board of Psychiatry and
Neurology or its foreign equivalent; or,

(B) a psychologist who has received a doctoral degree in
psychology from an educational institution accredited by an
organization recognized by the Council on Postsecondary
Accreditation or its foreign equivalent, and who is licensed
as a psychologist if the jurisdiction requires licensure.

(iii) A licensed physician who does not meet the requirements of
specialty training in psychiatry established in this Standard but
who has completed the postdoctoral training requirements of
another medical specialty, may, upon performing an adequate
evaluation, qualify to testify as an expert witness regarding any
physical condition or any organically based mental disability
within the scope of the professional's specialized knowledge.

(iv) A certified special education teacher, speech or language
pathologist, or an audiologist, who is licensed or certified if the
jurisdiction requires licensure or certification for the respective
discipline, may, upon performing an adequate evaluation, qualify
to testify as an expert witness regarding a disability within the
scope of the professional's specialized knowledge.

Standard 7-3.11. Presentation of expert testimony

(a) An attorney intending to call an expert witness should assist the expert in
preparing for trial consistent with Standard 7-3.6(c).
(b) The expert’s opinion should be presented in a form consistent with Standard 7-3.8.

(c) The expert should identify and explain the theoretical and factual basis for the opinion and the reasoning process through which the opinion was formulated. In doing so, the expert should be permitted to describe facts upon which the opinion is based, regardless of their independent admissibility under the rules of evidence, if the court finds that the Sixth Amendment to the U.S. Constitution and similar relevant state provisions permit admission of these facts and that:

(i) they are of a type that is customarily relied upon by mental health professionals in formulating their opinions; and

(ii) they are relevant to serve as the factual basis for the expert's opinion; and

(iii) their probative value outweighs their tendency to prejudice or confuse the trier of fact.

(d) Every jurisdiction should promulgate written guidelines designed to inform and advise mental health professionals called to testify as expert witnesses about all aspects of the law and procedure within that jurisdiction applicable to the effective presentation of expert opinions.

Standard 7-3.12. Jury instructions

(a) The court should instruct the jury concerning the functions and limitations of mental health professional expert testimony. As provided for in Standard 15-4.4(d), preliminary instructions should be given prior to the introduction of the expert testimony. The jury should be informed that the purpose of such testimony is to identify for the trier of fact the clinical factors relevant to the issues of past, present, and future mental condition or behavior that are under consideration.

(b) Jurors also should be informed that they are not asked or expected to become experts in medicine, psychology, or other behavioral sciences and that their task is to decide whether the explanation offered by a mental health professional is persuasive. In evaluating the weight to be given a mental health professional's opinion, the jury should consider the qualifications of the witness, the theoretical and factual basis for the mental health professional's opinion, and the reasoning process by which
the information available to the expert was utilized to formulate the
opinion. In reaching its decisions on the ultimate questions in the trial, the
jury is not bound by the opinions of expert witnesses. The testimony of
each witness should be considered in connection with the other evidence
in the case and given such weight as the jury believes it is fairly entitled to
receive.
PART IV. COMPETENCE TO PROCEED: GENERAL PROVISIONS

Standard 7-4.1. Competence to proceed; rules and definitions

(a) In any criminal proceeding that takes place prior to or during adjudication of guilt and that requires the presence of the defendant, other than a proceeding pertaining to the defendant's competence to proceed and proceedings (such as bail hearings) where a competence requirement would seriously prejudice the defendant, the defendant must be competent to proceed.

(b) The test for determining the defendant's competence to proceed when the defendant is represented by counsel should be whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and otherwise to assist in the defense, and whether the defendant has a rational as well as factual understanding of the proceedings.

(c) The tests for determining whether the defendant is competent to waive representation by counsel and to proceed pro se are specified in Standard 7-5.3.

(d) The terms competence and incompetence as used with Part IV of this chapter refer to mental competence or mental incompetence. A finding of incompetence to proceed may arise from any mental disorder or condition as long as it results in a defendant's inability to consult with defense counsel or to understand the proceedings.

Standard 7-4.2 Competence to Plead

(a) No plea of guilty or nolo contendere should be accepted from a defendant who is incompetent to proceed.

(i) Absent additional information bearing on the defendant's competence, a finding that the defendant is competent to proceed should be sufficient to establish the defendant's competence to enter a plea of guilt or nolo contendere.

(ii) The test for determining mental competence to proceed with pleading should be whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and whether, given the nature and complexity of the charges and the potential consequences of a
conviction, the defendant has a rational as well as factual understanding of the proceedings relating to entry of a plea of guilty or nolo contendere.

(b) Evaluations of persons believed to be incompetent to proceed with pleading and treatment of persons found incompetent to proceed with pleading should take place in accordance with this part.

Standard 7-4.3. Responsibility for raising the issue of competence to proceed

(a) The court has a continuing obligation, separate and apart from that of counsel for each of the parties, to raise the issue of incompetence to proceed at any time the court has a good faith doubt as to the defendant's competence, and may raise the issue at any stage of the proceedings on its own motion.

(b) The prosecutor should move for evaluation of the defendant's competence to proceed whenever the prosecutor has a good faith doubt as to the defendant's competence. The prosecutor should further advise defense counsel and the court of any information that has come to the prosecution's attention relative to defendant's incompetence to proceed.

(c) Defense counsel may seek an ex parte evaluation or move for evaluation of the defendant's competence to proceed whenever counsel has a good faith doubt about the defendant’s competence, even if the motion is over the defendant's objection.

(d) A motion for evaluation should be in writing and contain a certificate of counsel indicating that the motion is based on a good faith doubt about the defendant’s competence to proceed consistent with (f). Defense counsel should make known to the evaluator the specific facts that have formed the basis for the motion.

(e) Neither party should move for an evaluation of competence in the absence of a good faith doubt that the defendant is competent to proceed. Nor should either party use the incompetence process for purposes unrelated to assessing and adjudicating the defendant’s competence to proceed, such as to obtain information for mitigation of sentence, obtain a favorable plea negotiation, or delay the proceedings against the defendant. Nor should the process be used to obtain treatment unrelated to the defendant’s competence to proceed; rather such treatment should be sought pursuant to
Part II of these Standards, whether the defendant is in jail, the community, or an inpatient facility.

(f) In making any motion for evaluation, or, in the absence of a motion, in making known to the court information raising a good faith doubt of defendant's competence, the defense counsel should not divulge confidential communications or communications protected by the attorney-client privilege.

Standard 7-4.4. Judicial order for competence evaluation

(a) Whenever, at any stage of the proceedings, a good faith doubt is raised as to the defendant's competence to proceed and the requirements below are met, the court should order an evaluation and conduct a hearing into the competence of the defendant to proceed. The court should follow this procedure whether the doubt arises from a motion of counsel, from information supplied by counsel, from the court's own observation of the defendant, or from any information otherwise known to the court.

(i) The court should not order an evaluation of a defendant's competence to proceed before there has been a determination of probable cause by a judge, grand jury or prosecutor unless an earlier evaluation is requested by defense counsel. If it is determined that probable cause for criminal prosecution does not exist, there should be no further inquiry into the defendant's competence to proceed.

(ii) An evaluation to determine competence to proceed should not be ordered before the defendant is represented by counsel who has had an opportunity to consult with the defendant and to be heard by the court.

(b) The evaluator(s) appointed to perform the evaluation of the defendant's competence to proceed should be qualified by training and experience to offer testimony to the court on matters affecting competence. A mental health professional who is appointed as an evaluator should have the qualifications set forth in Standard 7-3.9.

(c) The order for evaluation should specify the nature of the evaluation to be conducted and should specify the legal criteria to be addressed by the evaluator in accordance with the requirements set forth in Standard 7-3.4(e). Unless requested by the defendant, or for good cause shown in
accordance with Standard 7-3.4(d), the evaluation should not include an
evaluation into the defendant's mental condition at the time of the offense
or other matters collateral to the issues of competence to proceed.

(d) Each jurisdiction should establish time periods by which the evaluation
should be concluded and a report returned to the court. Such periods
normally should not exceed [fourteen] days unless good cause is shown
that an extension is necessary for an adequate evaluation. Such extensions
should last no longer than [fourteen] days.

Standard 7-4.5. Location of competence examination

(a) Whenever feasible, evaluation of a defendant’s competence to proceed
should be conducted in the locality in which the defendant is charged. A
defendant should be evaluated in jail only when the defendant is ineligible
for release to the community. A defendant may be evaluated in an
inpatient facility only when

(i) an outpatient evaluation of the defendant determines that the
defendant must be admitted to the facility for a professionally
adequate evaluation to be completed

(ii) the defendant is admitted to the facility for treatment unrelated to
the evaluation, or

(iii) the defendant will not submit to outpatient examination as a
condition of pretrial release.

(b) Confinement authorized under (a) may continue for such time as is
necessary for the evaluation to determine competence, consistent with
Standard 7-4.4(c).

(c) Pendency of proceedings to determine competence to proceed should not
postpone judicial determination of eligibility for pretrial release.

Standard 7-4.6. Report of evaluator

(a) The first matter to be addressed in the report should be the defendant's
competence to proceed. If the opinion of the evaluator is that the
defendant is competent to proceed, issues relating to treatment should not
be addressed. If the opinion of the evaluator is that the defendant is not
competent to proceed, or that the defendant is competent to proceed but
that continued competence is dependent upon maintenance of treatment,
the evaluator should then report on the treatment necessary for the
defendant to attain or maintain competence, with a presumption that such
treatment should take place in the community.

(b) If the evaluator determines that treatment is necessary for the defendant to
attain or maintain competence, the report should address the following
issues:

(i) the condition causing the incompetence;

(ii) the treatment required for the defendant to attain or maintain
competence and an explanation of appropriate treatment
alternatives in order of choice;

(iii) the availability of the various types of acceptable treatment in the
local geographical area. The evaluator should indicate the
agencies or settings in which such treatment might be obtained,
including the jail. Whenever the treatment would be available on
an outpatient basis in the community, the evaluating expert should
make such fact clear in the report;

(iv) the likelihood of the defendant's attaining competence under the
treatment and the probable duration of the treatment.

(c) If the evaluator determines that the only appropriate treatment requires
that the defendant be taken into custody or involuntarily hospitalized, then
the report should include the following:

(i) an analysis of the defendant’s treatment needs that require
attention in a custodial or inpatient setting;

(ii) whether the defendant, because of the condition causing
incompetence, meets the criteria for placement in an inpatient
setting, as set forth by law;

(iii) whether there is a substantial probability that the defendant will
attain competence to proceed within the reasonably foreseeable
future;

(iv) the nature and probable duration of the treatment required for the
defendant to attain competence;
(v) alternatives to involuntary confinement the evaluator considered
and the reasons for the rejection of such alternatives.

**Standard 7-4.7. Use of reports**

(a) Any information or testimony elicited from the defendant at any hearing
or examination on competence or contained in any motion filed by the
defendant or any information furnished by the defendant to the court or to
any person evaluating or providing mental health services, and any
information derived therefrom, and any testimony of experts or others
based on information elicited from the defendant, should be considered
privileged information and should be used only in a proceeding to
determine the defendant's competence to proceed and related treatment
issues unless the privilege is waived.

(b) The defendant waives the privilege established in (a) by using or
indicating an intent to use the report or parts thereof for any other purpose.
Upon such waiver, the prosecutor should be permitted to use the report or
any part of the report to address the mental condition issue for which the
defendant uses the report, subject only to the applicable rules of evidence.

(c) If the privilege is not waived pursuant to (b), the report should be put
under seal after its use to determine competence and may only be unsealed
if subsequent proceedings relitigate that issue.

**Standard 7-4.8. Necessity for hearing on competence to proceed**

(a) In every case in which a good faith doubt of the defendant's competence to
proceed has been raised and as soon as practical after receipt of the reports
of the evaluators, the court should conduct a hearing on the issue of
competence to proceed unless all parties stipulate that no hearing is
necessary and the court concurs. If the defendant has been confined for
examination, the hearing should be held within [seven] days of the receipt
of the report of the evaluators; if the defendant is at liberty it should be
held within [thirty] days.

(b) If, after the competence evaluation, defense counsel and the defendant
disagree about whether a plea of incompetence should be asserted, special
counsel should be appointed to represent the defendant’s position during
the competency hearing.
If the parties agree on the issue of competence to proceed or issues related to treatment, a stipulation containing the factual basis for the agreement may be accepted by the court. The court, after review of the factual basis for the stipulation, should enter the appropriate order on the basis of the stipulation. In the absence of stipulation by the parties and concurrence by the court, a hearing on the issues should occur.

Trial by jury should not be required for the hearing on competence to proceed, provided that in those jurisdictions which authorize trial by jury for determination of issues of involuntary civil commitment, jury trial should be available to a defendant to determine issues of competence to proceed and of involuntary confinement for treatment to restore competence.

In lieu of or after a hearing, the parties may request that the court dispose of the case by either dismissing the charges without prejudice or placing the charges in abeyance, pending the defendant’s successful participation in treatment, if

(i) based on the reports of the evaluators, it appears that the defendant is incompetent to proceed but would be a suitable candidate for mental health treatment,

(ii) the prosecutor and the defense attorney agree that such diversion would be preferable to an order for restoration of competence to proceed, and

(iii) the defendant assents to such diversion.

Standard 7-4.9. Hearing on competence; defendant's rights, evidence, and priority of issues

In all hearings regarding competence, a defendant should have:

(i) the right to be present at the hearing, to fully cross-examine witnesses, to call independent expert witnesses, to have compulsory process for the attendance of witnesses, and to have a transcript of the proceedings. Either party should have the authority to call and examine any person identified by the evaluators as a source of information for the evaluative report other than the defendant or the defense attorney.
the right to adequate notice and time to prepare for the hearing, including timely disclosure of the report of appointed evaluators and, if necessary, opportunity to interview or, in those jurisdictions that so provide, to depose the evaluators before the hearing.

(b) Evidence presented at the hearing should conform to rules of evidence applicable to criminal cases within that jurisdiction. The evaluators, whether called by the court or by either party, should be subject to examination.

(i) Defense counsel may elect to relate to the court personal observations of and conversations with the defendant to the extent that counsel does not disclose the substance of confidential communications or violate the attorney-client privilege; counsel so electing may be cross-examined to that extent. Such testimony does not disqualify the attorney from representing the defendant.

(ii) The court may properly inquire of defense counsel about the attorney-client relationship and the client's ability to communicate effectively with counsel. The defense counsel, however, should not be required to divulge the substance of confidential communications or those that are protected by the attorney-client privilege. Defense counsel responding to inquiry by the court on its own motion should not be subject to cross-examination by the prosecutor.

(c) At the hearing, the court should consider separately each discrete issue raised and should first consider the issue of the defendant's competence to proceed.

(i) The party raising the issue of incompetence should have the burden of going forward with the evidence to show incompetence.

(ii) If the court, after hearing the evidence, finds by a preponderance of the evidence that the defendant is competent to proceed the matter should proceed to trial; if the defendant is found not competent, the court should proceed to issues of treatment to restore competence.

Standard 7-4.10. Hearing on competence; dispositional issues
Once the court has found that the defendant is not competent to proceed or that competence depends on continuation of treatment, the court should consider issues relating to treatment to restore competence.

(a) A defendant may be ordered to undergo treatment if the court finds that there is a substantial probability the treatment will restore the defendant to competence in the foreseeable future.

(ii) The court may order treatment be administered on an outpatient basis (including as a condition of pretrial release), at a custodial facility, or at an inpatient mental health facility.

(iii) A defendant should not be involuntarily hospitalized to restore or sustain competence unless the court determines by clear and convincing evidence that:

(A) treatment appropriate for the defendant to attain or maintain competence is available in the facility; and

(B) no appropriate treatment alternative is available that is less restrictive than placement in the facility.

(b) At the conclusion of the hearing the court should enter its written order for treatment to restore competence. The order should contain the following:

(i) written findings of fact setting forth separately and distinctly the findings of the court on the issues of competence, treatment, and involuntary hospitalization, if applicable;

(ii) information sufficient for a professional involved in providing treatment to ascertain the charge against the defendant and the nature of the condition causing the incompetence;

(iii) a finding that the institution, program, or provider to which the defendant is to be committed or referred is sufficiently staffed and equipped to meet that defendant's treatment needs, or a finding that the ordered disposition is the best available option; and

(iv) when reports will be required under 7-4.12 from the professionals providing treatment.

(c) An order adjudicating the defendant incompetent to proceed should be an appealable order.
Standard 7-4.11. Right to treatment and to refuse

(a) A defendant determined to be incompetent to proceed has a right to prompt and adequate treatment to restore competence and a right to have such services administered by competent and qualified professionals.

(b) Within [fourteen] days after entry of an order detaining or committing a defendant for treatment or directing that a defendant report for treatment on an outpatient basis, and assuming the person is not already restored to competence, the professional providing such services should develop and file with the court, copies being made available to both parties, an individualized plan of treatment. Each treatment plan should contain the following:

(i) a statement of the specific causes of defendant's incompetence including, where appropriate, diagnosis and description of any mental disorder, and reference to any other factors causing the incompetence to proceed;

(ii) a statement of the planned treatment, whether medical, psychological, educational, or social, appropriate to restore competence;

(iii) a statement setting forth any restrictions to be placed on the defendant and the reasons for imposing such restrictions;

(iv) a statement of the expected duration of treatment required to restore the defendant's competence.

(v) provision for periodic review of the plan’s efficacy.

(c) A defendant has a right to treatment in the least restrictive setting appropriate to restore competence to proceed.

(i) If the criteria for commitment to an inpatient facility in Standard 7-4.10(a) (iii) are met, a defendant may be treated in a forensic facility or a general treatment facility whose staff have training and experience in the treatment of persons under criminal charges.

(ii) Whenever a defendant who is incompetent to proceed has been denied pretrial release or is unable to meet the release conditions imposed, that defendant may be detained in jail only if adequate
treatment to restore competence is provided in that setting. Otherwise treatment must be in a mental health facility.

(d) A defendant determined to be incompetent to proceed and committed for treatment should have the right to refuse any treatment that has an unreasonable risk of serious, hazardous or irreversible side effects. Otherwise, such a defendant may be subject to psychoactive medication over objection if:

(i) the government’s interests in prosecuting the defendant are important;

(ii) the medication proposed is substantially likely to restore the defendant to competence and substantially unlikely to have side effects that will interfere significantly with the defendant’s ability to assist counsel;

(iii) the medication is necessary to restore competence, and any less intrusive treatments are unlikely to achieve the same result; and

(iv) the medication is in the defendant’s best medical interests in light of the defendant’s medical condition.

(e) If a defendant found incompetent to proceed is treated with medication in an inpatient facility, becomes competent, and is returned to jail or to the community to await further legal proceedings, the court should order as a condition of the defendant’s return that the receiving facility or local treatment facility continue such treatment as the inpatient facility may recommend to maintain the defendant’s competence. Only if such treatment in the local facility is clearly not feasible should the court consider ordering the defendant returned to the inpatient facility pursuant to Standard 7-4.10 (a) (iii) until proceedings against the defendant are ready to commence.

Standard 7-4.12. Periodic redetermination of incompetence

(a) Defendant's continuing incompetence to proceed should be periodically redetermined by the court without the necessity of motion by either party. The facility or person responsible for treatment should therefore be required periodically to file with the court a report on the defendant's current status, with copies to the prosecutor and defense counsel and with notice to the defendant. The report should be filed:
(i) any time the treating facility or person responsible for treatment concludes that the defendant has attained competence to proceed;

(ii) any time the treating facility or person responsible for treatment concludes that there is not a substantial probability that the defendant will attain competence within the foreseeable future; or

(iii) at the following intervals: 30 days, 90 days, 180 days, and every 180 days thereafter.

(b) The report should contain the following:

(i) a reevaluation of those issues required by Standard 7-4.6 to be contained in the initial report to the court;

(ii) a description of the treatment administered to the defendant;

(iii) an evaluation of the defendant's continued progress toward attaining competence within the reasonably foreseeable future, if the report concludes that the defendant remains incompetent to proceed.

Either party should have the right to contest the report or any issues addressed in the report within such time as is established in that jurisdiction and the right to demand a hearing on the issues contested, pursuant to Standard 7-4.10.

(i) Before the hearing, upon motion of either party and upon cause shown, the court should order that the defendant be evaluated by independent mental health professionals and that reports be submitted;

(ii) Each party should have the right to present evidence at the hearing. At the conclusion of the hearing the court should enter its written order setting forth separately and distinctly the findings of the court on the issues of competence, treatment, and involuntary confinement.

(d) If neither party contests the report within the time set, the court should independently review the report and:
(i) if the court concurs in the report’s conclusions the court should enter an order accepting the report and continuing the defendant’s treatment or setting the case for trial, as appropriate;

(ii) if the court does not concur in the report’s conclusions the court, if appropriate, should order an independent reevaluation of the defendant and should hold a hearing on the issues addressed in the report.

(e) Notwithstanding the availability of periodic redeterminations by the court, either party should, upon good cause to believe that a defendant has attained competence to proceed, be able to initiate a redetermination of the defendant’s competence under Standard 7-4.10.

(i) The prosecutor or defense counsel, upon a showing of good cause, should be able to make a motion for reevaluation of a defendant by independent evaluators or for rehearing by the court of the issue of the defendant’s continuing incompetence. For good cause shown, the court should be empowered to order such reevaluation or rehearing at any time.

(ii) Defense counsel should be permitted to have the defendant reevaluated at defense expense at any time, and the treating institution should be mandated to make the defendant available to the evaluator for reexamination. All records necessary for independent evaluation should be available to the prosecutor or defense counsel at any time.

**Standard 7-4.13. Defense motions; proceedings while defendant remains incompetent**

The fact that the defendant has been determined to be incompetent to proceed should not preclude further judicial action, defense motions, or discovery proceedings which may fairly be conducted without the personal participation of the defendant.

**Standard 7-4.14. Disposition of unrestorably incompetent defendants**

(a) A defendant may be adjudged unrestorably incompetent to proceed (unrestorable) if the defendant has previously been adjudged incompetent and the court finds by a preponderance of evidence that there is no substantial probability that the defendant will become competent to proceed within the foreseeable future.
(b) The court should hold a hearing to determine whether the defendant is unrestorable whenever the issue has been raised by the report of the professional providing treatment, at the expiration of the maximum time of sentence for the crime charged or [twelve/eighteen] months from the date of adjudication of incompetence to proceed, whichever first occurs.

(c) If the defendant has been found unrestorable then the defendant should be released from any detention or commitment for treatment to attain or restore competence. If the defendant meets the criteria for involuntary civil commitment, the court may order such commitment and may direct that initial commitment take place in a forensic facility.

Standard 7-4.15. Conducting proceedings when the defendant is taking medication

(a) A defendant should not be considered incompetent to proceed because the defendant's competence is dependent upon continuation of treatment which includes medication, nor should a defendant be prohibited from standing trial or entering a plea solely because that defendant is being provided such services under professional supervision.

(b) If the defendant proceeds to trial with the aid of treatment that may affect demeanor, either party should have the right to introduce evidence regarding the treatment and its effects, and the jury should be instructed accordingly.

Standard 7-4.16. Credit for time served

A defendant who has been detained or committed for examination of competence to proceed or treatment to restore competence to proceed should receive credit against any sentence ultimately imposed for the time of such pretrial confinement.
PART V. COMPETENCE IN SPECIFIC CONTEXTS

Standard 7-5.1 Competence to proceed in specific contexts and related issues

(a) Legislatures and courts should recognize that special competence issues arise when defense counsel has good faith doubts about the defendant’s ability to make significant decisions, when the defendant wants to proceed pro se, when the defendant is subject to police interrogations, and when the proceeding at issue occurs after conviction.

(b) Standard 7-5.2 applies when defense counsel has doubts about the defendant’s competence to make decisions about matters within the defendant’s sphere of control.

(c) Standard 7-5.3 applies when the defendant elects to proceed without counsel and when, after such election, the defendant proceeds pro se.

(d) Standard 7-5.5 governs the admissibility of statements made by people with mental disorder during interrogation and related issues.

(e) Standards 7-8.7 and 7-8.8 govern competence to proceed of defendants represented by counsel in noncapital sentencing and post-conviction proceedings and Standards 7-9.8 and 9.9 govern competence issues relating to capital sentencing and post-conviction proceedings.

Standard 7-5.2 Competence to proceed with specific decisions: control and direction of case

(a) Matters that are under the defendant’s sphere of control include the decisions to plead guilty, assert a defense of nonresponsibility [insanity defense], and waive the rights to jury trial, testify, and appeal.

(b) The test for determining whether the defendant is competent to make a decision regarding control and direction of the case should be whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the nature and consequences of the decision or decisions under consideration.

(c) If the defense attorney has a good faith doubt concerning the defendant’s competence to make decisions within the defendant’s sphere of control under (a), the defense attorney may make a motion to determine the defendant’s competence to proceed under Standard 7-4.3 even if the defendant has previously been found competent to proceed in the case. Upon such motion, the court should order a mental health evaluation, if
necessary, according to the procedures set forth in Standard 7-4.4, and
indicate the specific decisional issue in question. If, after a hearing, the
court finds the defendant competent to proceed, defense counsel should
follow the defendant’s direction on matters within the defendant’s sphere
of control. If the defendant is found incompetent, the court should order
treatment according to Part IV.

Standard 7-5.3. Competence to elect to proceed without representation by
counsel; competence to proceed pro se

(a) A defendant who is incompetent to elect to proceed without representation
by counsel should not be permitted to proceed to trial or enter a plea of
guilt or nolo contendere while unrepresented by counsel.

(b) The test for determining competence to elect to proceed without
representation by counsel should be whether the defendant

(i) is competent to proceed under Standard 7-4.1(b),

(ii) has a rational and factual understanding of the possible
consequences of proceeding without legal representation, including
difficulties the defendant may experience due to his or her mental
or emotional condition or lack of knowledge about the legal
process, and

(iii) the ability to make a voluntary, knowing, and rational decision to
waive representation by counsel.

(c) A defendant who is competent to elect to proceed without representation
by counsel may plead guilty if competent to do so under Standard 7-4.2.

(d) A defendant who is competent to elect to proceed without representation
by counsel may represent him or herself at trial unless the court finds that,
as a result of mental disorder,

(i) the defendant lacks the capacity to carry out the minimum tasks
required for self-representation at trial to such a substantial extent
as to compromise the dignity or fairness of the proceeding, or

(ii) the defendant will significantly disrupt the decorum of the
proceeding.

(e) If, after explaining the availability of a lawyer and making sufficient
inquiry of a defendant professing a desire to waive representation by
counsel and proceed pro se, the trial judge has a good faith doubt about the
defendant’s competence with respect to either waiver or pro se
representation, the judge should order a pretrial evaluation of the
defendant according to the procedures set forth in part IV of this chapter.

(f) After obtaining the report of the evaluators, the court should hold a
hearing at which the defendant is represented on the issues raised
according to the procedures set forth in part IV of this chapter.

(i) If the court determines that the defendant is both competent to
elect to proceed without representation by counsel and competent
to proceed pro se, the court should proceed with the case. The
court in any such case should consider the appointment of standby
counsel in accordance with Standard 6-3.7 to assist the defendant
or, if it should prove necessary, to assume representation of the
defendant.

(ii) If the court determines that the defendant is incompetent to elect to
proceed without representation by counsel, the court should
proceed to consider treatment in accordance with part IV of this
chapter.

(iii) If the court determines that the defendant is competent to elect to
proceed pro se but is not competent to proceed to trial without
representation of counsel, the court should appoint counsel to
represent the defendant and should proceed to trial of the case.

Standard 7-5.4. Use of statements by people with mental disorder at trial

(a) This Standard addresses competence and admissibility issues that arise
when people with mental disorder make incriminating statements to the
police that are potentially:

(i) unreliable, as described in (b).

(ii) involuntary, as described in (c),

(iii) obtained in violation of *Miranda v. Arizona*, as described in (d).

(b) Where the court finds that the reliability of a statement has been
significantly impaired by a person's mental disorder, it should exclude the
statement from evidence even in the absence of official misconduct.

Where the statement has not been excluded, the court should permit
evidence to be presented to the trier of fact regarding the effect of the
defendant's mental disorder on the reliability of the statement.

(c) Courts should recognize that official conduct that does not constitute
impermissible coercion when persons without mental disorder are
interrogated may impair the voluntariness of the statements of persons
with mental disorder. Where such impairment of voluntariness is
significant, the court should exclude the statement from evidence.
However, in the absence of any such impermissibly coercive official
conduct, such statement should not be excluded from evidence solely
because it was the product of the person's mental disorder, unless it is
found unreliable pursuant to Standard 7-5.4(b).

(d) Statements made by persons with mental disorder in response to custodial
interrogation should be admissible only if the person has a factual and
rational understanding of his or her rights and makes a knowing and
voluntary waiver of them. A person's mental disability can affect and
impair each element of an otherwise valid waiver.

(d) The court should admit into evidence at both pretrial hearings and trial
otherwise admissible expert testimony by qualified mental health
professionals bearing on the effect of a person's disorder on the reliability
and voluntariness of a statement and the validity of any waiver of rights
that preceded such a statement.
PART VI. NONRESPONSIBILITY FOR CRIME

Standard 7-6.1. The defense of mental nonresponsibility [insanity]
(a) A person is not responsible for criminal conduct if, at the time of such conduct, and as a result of mental disorder, that person was unable to appreciate the wrongfulness of such conduct.

(b) When used as a legal term in this Standard, mental disorder refers to any disorder that substantially affected the mental or emotional processes of the defendant at the time of the alleged offense, unless it was a disorder manifested primarily by repeated criminal conduct or was attributable solely to the acute effects of voluntary use of alcohol or other drugs.

Standard 7-6.2. Admissibility of other evidence of mental condition
Evidence, including expert testimony, concerning the defendant’s mental condition at the time of alleged offense which tends to show the defendant did or did not have the mental state required for the offense charged should be admissible, consistent with Standard 7-3.8(a) restricting experts to testimony based on their specialized knowledge.

Standard 7-6.3. Control and notice of defense based on mental condition
(a) The decision whether to raise a defense of mental nonresponsibility under Standard 7-6.1 is the defendant’s. The decision whether to introduce evidence of mental condition under Standard 7-6.2 is the defense attorney’s.

(b) If the defense intends to rely upon the defense of mental nonresponsibility [insanity] or introduce expert testimony relating to mental condition at the time of the offense charged, it should, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the prosecuting attorney in writing of such intention and file a copy of such notice with the clerk. The court may, for cause shown, allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate. If notice is not given in compliance with the requirements of this Standard, the court may impose sanctions appropriate to the degree of prejudice to the prosecution.

Standard 7-6.4. Evaluation procedures to determine mental condition at the time of the offense
(a) Prior to the notice required in Standard 7-6.3(b) the defense may seek evaluation of the defendant’s mental condition at the time of the offense. Standard 7-3.3(a) governs when the defendant is entitled to funding for this evaluation.
(b) After the defendant’s notice as provided in Standard 7-6.3(b) and a finding that the defendant intends to rely upon expert testimony, the court may, on motion of the prosecuting attorney, order the defendant to be examined by an expert designated in the order for the purpose of determining the mental condition that is being put in issue by the defendant. If the court determines that an adequate evaluation of defendant's mental health condition at the time of the alleged crime has been precluded because the defendant has refused to cooperate with the mental health professional, it should adopt remedial measures proportionate to the degree of prejudice to the prosecution and the extent to which the non-cooperation was influenced by the defendant’s mental disorder.

c) The court should not on its own motion order an evaluation of the defendant to determine mental condition at the time of the offense and should not grant such a motion from the prosecution except as provided in (b) of this Standard.

d) Procedures for conducting evaluations of mental condition at the time of the offense, including the attorneys’ duty to provide information, the terms of the court order, the presence of counsel during the evaluation, recording of the evaluation, and the conduct of joint evaluations are governed by Standards 7-3.4 and 7-3.5.

e) Procedures for preparing reports on the mental condition at the time of the offense are governed by Standards 7-3.6.

**Standard 7-6.5. Discovery and disclosures**

(a) Upon giving notice under Standard 7-6.3(b), the defense should provide the prosecution with the results of its evaluation(s), as provided in Standard 7-3.7(b)(i).

(b) Pursuant to Standard 11-2.1 in the Discovery Standards, the prosecution should timely provide the defense with information bearing on the defendant’s mental condition at issue, including expert reports or statements, the results of mental evaluations and tests, and any written or recorded statements and the substance of any oral statements made by the defendant. Additionally, upon receiving notice under Standard 7-6.3(b), the prosecutor should, as soon as reasonably practicable, disclose to defense counsel:

(i) any information that tends to rebut the factual data upon which the experts called by the defendant are relying, including documents, names and addresses of witnesses and their relevant written or recorded statements, and substance of any oral statements;
(ii) the names, addresses, and statements of any experts whom the
prosecutor intends to call for the purpose of discrediting the mental
nonresponsibility [insanity] defense or evidence of mental
condition.

(c) Admissibility and disclosure of evaluation results are governed by
Standard 7-3.2(a) (on the admissibility of defendant’s evaluation
statements), Standard 7-3.2(b) (on the use of information relevant to
competence to proceed or imminent risk), and Standard 7-3.4(c) (on
disclosure of evaluation results to the public).

Standard 7-6.6. Limitation on opinion testimony concerning mental
condition

Expert testimony as to how the development, adaptation, and functioning
of the defendant’s mental processes may have influenced the defendant’s
conduct at the time of the offense charged should be admissible.
Consistent with Standard 7-3.8(a), expert reports and testimony should be
based on specialized knowledge of the expert and the insanity test
language should be used only if the expert can explain its clinical
relevance. Testimony that a defendant is “sane” or “insane” should not be
used unless required by the jurisdiction.

Standard 7-6.7. A unitary trial

The defense of mental nonresponsibility [insanity] and all other evidence
pertaining to the defendant’s responsibility for the acts charged should be
heard in a unitary trial unless, upon the defendant’s request, the court
determines that trying the issue of guilt separately from the issue of
responsibility is necessary to prevent substantial prejudice to the
defendant.

Standard 7-6.8. Instruction to the jury

Upon motion of either party, the court may instruct the jury as to the
dispositional consequences of a verdict of not guilty by reason of mental
nonresponsibility [insanity].

Standard 7-6.9. Burden of production and burden of persuasion

(a) The defense should have the burden of ensuring that evidence of mental
nonresponsibility [insanity] is introduced.

(b) Once evidence of mental nonresponsibility [insanity] has been introduced
at trial, the party with the burden of persuasion should prevail if it meets
the preponderance of the evidence standard of proof.
Nothing contained in paragraph (b) above relieves the prosecution of its burden of proving beyond a reasonable doubt all elements of the offense charged including the mental state required for the offense charged.

**Standard 7-6.10. Forms of verdict**

(a) When the defense of mental nonresponsibility [insanity] has been properly raised, the verdict returned should be in the form of either guilty, not guilty, or not guilty by reason of mental nonresponsibility [insanity]. The jury should be instructed that it may consider the verdict of not guilty by reason of mental nonresponsibility [insanity] only after finding, beyond a reasonable doubt, that the defendant committed the conduct charged.

(b) Legislatures should not enact statutes that supplant or supplement the verdict of not guilty by reason of mental nonresponsibility [insanity] with a verdict of guilty but mentally ill.
PART VII. COMMITMENT OF NONRESPONSIBILITY ACQUITTEES

Standard 7-7.1. Commitment following mental nonresponsibility [insanity] acquittal

(a) Mental nonresponsibility acquittees may be involuntarily confined pursuant to special commitment criteria that:

(i) are less demanding in certain respects than the criteria typically required for general involuntary civil commitment of individuals with mental disorder who have not been charged with a crime, and

(ii) if proven, may result in confinement in forensic mental health facilities that are more secure than the civil hospitals relied upon in the general involuntary commitment setting.

(c) If the commitment of a mental nonresponsibility acquittee is not sought, or if the commitment is sought but the court declines to order such commitment, the acquittee should be released.

(d) In jurisdictions that confer authority on an administrative board or a statewide forensic director to make commitment and release decisions about individuals acquitted by reason of mental nonresponsibility, the provisions of this part referring to the director of the mental health facility should be modified accordingly.

Standard 7-7.2. Commitment procedures; special and general

(a) Each state should adopt a separate set of special procedures ("special commitment") for seeking the civil commitment of those acquittees who were acquitted by reason of mental nonresponsibility of offenses involving acts causing, threatening, or creating a substantial risk of death or serious bodily harm. These procedures should include the dispositional option of conditional release, consistent with Standard 7-7.12.

(b) States may seek the civil commitment of mental nonresponsibility [insanity] acquittees who were acquitted of offenses that did not involve acts causing, threatening, or creating a substantial risk of death or serious bodily harm only by using those procedures used for the general civil commitment (commitment of persons outside the criminal justice system).

Standard 7-7.3. Evaluation

(a) After issuance of a verdict of not guilty by reason of mental nonresponsibility in cases governed by 7-7.2(a), the trial court, upon motion by the prosecution, should order an evaluation of whether the
acquitee meets the commitment criteria set out in Standard 7-7.4(b). The
time allotted for evaluation should not exceed [thirty] calendar days
except, when for good cause shown, the court extends the period for up to
an additional [thirty] calendar days. This evaluation is for the sole purpose
of assisting the court in determining whether the acquittee should be
committed.

(b) The court may order that the evaluation be conducted while the mental
nonresponsibility acquittee is in the community, in a correctional facility,
or in a mental health facility. In choosing the location of the evaluation,
the court should be guided by the least restrictive alternative principle and
concern for public safety. The evaluation should be conducted by mental
health professionals possessing the qualifications required by Standard 7-
3.9.

(c) During the evaluation process, mental nonresponsibility acquittees should
have the same rights regarding treatment as do persons subject to general
civil commitment stem, consistent with the requirements of institutional
and public safety.

(d) The evaluation should be completed and an evaluation report should be
submitted to the court and to all parties within the time allotted for the
evaluation under (a). Upon submission of the evaluation report the
prosecuting attorney may move for a commitment hearing. If the
prosecuting attorney decides to seek commitment, a motion for a hearing
must be filed within [five] days. That hearing must be held within [fifteen]
days from the court’s receipt of the evaluation report.

(e) If the prosecuting attorney does not file a timely motion seeking
commitment, an acquittee in custody should be released.

**Standard 7-7.4. Special procedures; commitment criteria**

(a) Special commitment procedures for mental nonresponsibility acquittees
acquitted of offenses involving acts causing or creating a substantial risk
of death or threatening serious bodily harm should afford acquittees the
right to a commitment hearing which meets the requirements set forth in
Standard 7-7.5

(b) At the conclusion of the commitment hearing, the court may order the
acquittee committed if it finds:

(i) beyond a reasonable doubt that the acquittee committed the
criminal act for which he or she was acquitted by reason of mental
nonresponsibility [insanity], unless the trier of fact made such a
finding at the acquittee’s criminal trial, as provided in Standard 7-6.10(a), and

(ii) by a preponderance of the evidence that, due to mental disorder of the type described in Standard 7-6-1(b), the acquittee is at risk for causing a substantial risk of bodily harm to others in the foreseeable future if not committed, or

(iii) by a preponderance of the evidence that the acquittee does not meet the criteria in (b)(ii) due to the effect of treatment currently being received, in which case the acquittee may be committed unless the acquittee proves by a preponderance of the evidence that the acquittee will continue to receive such treatment following release for as long as the treatment is required.

(c) Commitment should result in confinement in a forensic mental health facility unless the acquittee proves by a preponderance of the evidence that conditions imposed pursuant to Standard 7-7.12 will provide adequate protection of the community.

Standard 7-7.5. Special commitment hearings

(a) A special commitment system for mental nonresponsibility acquittees should provide the procedural protections described in this Standard.

(b) The acquittee should be represented by counsel at the commitment hearing and is entitled to assistance of counsel during this period. If the acquittee is without counsel, the court should appoint counsel. If the acquittee is unable to afford counsel, the cost should be borne by the state. Representation by counsel cannot be waived except as provided in Standard 7-5.3.

(c) At the hearing, the acquittee is entitled to confront and cross-examine adverse witnesses. The acquittee is also entitled to present witnesses, including an independent expert witness or expert witnesses. For financially eligible acquittees, the reasonable cost of expert witnesses should be borne by the state.

(d) At the hearing, the rules of evidence should apply.

(e) An acquittee’s refusal to participate in an evaluation under Standard 7-7.3 may be taken into account by the court in determining whether commitment criteria are met.

(f) The acquittee should have the right to appeal on the record an adverse ruling on the issue of commitment. The appeal should be heard on an expedited basis.
Standard 7-7.6. Special commitment; conditions of confinement

Consistent with the requirements of institutional and public safety, persons committed to a mental health facility pursuant to special commitment statutes should be confined under comparable conditions and with the same rights of persons committed under general commitment statutes. Placement should be in the least restrictive treatment environment, which can include a civil hospital.

Standard 7-7.7. Special commitment; maximum duration of commitment order

(a) When, pursuant to Standard 7-7.4, a court hospitalizes or conditionally releases a mental nonresponsibility acquittee, it should also issue an order setting the maximum duration of the acquittee’s special commitment. The maximum duration set by the court should not exceed the maximum term of incarceration provided by law for the most serious count in the indictment or information had the acquittee been found responsible for the crime charged. Upon the expiration of the maximum duration of special commitment, the criminal court’s jurisdiction over the acquittee should cease, and any confinement or conditional release of the acquittee ordered by such court should terminate.

(b) In setting the maximum duration for special commitment, as in other commitment proceedings under this chapter, the court should consider the acquittee’s need for treatment and its concerns for the public’s safety, but it may not consider retribution or punitive factors.

Standard 7-7.8. Special commitment; periodic review

(a) A specially committed acquittee may petition for a judicial hearing to determine whether the acquittee continues to meet the criteria for special commitment set forth in Standard 7-7.4. The acquittee may petition the court for such a hearing [six months] after the acquittee’s original special commitment, and every [year] thereafter. At the original commitment hearing, or at subsequent periodic review hearings under this Standard, the court may issue an order allowing the acquittee to petition for a rehearing sooner than the mandatory period stated herein. The court should issue such an order when it appears that the acquittee’s mental condition and other relevant factors warrant a shorter interval between periodic review hearings.

(b) Upon filing of a petition for a review hearing the court should convene a hearing within [thirty] days, which should be conducted in accordance with the procedures set forth in Standard 7-7.5.
At any hearing held within one year of the acquittee’s original special commitment, commitment may continue if the criteria in Standard 7-7.4(b)(ii) or (iii) are met.

At any hearing held a year or more after the original special commitment, commitment may continue if the state proves by clear and convincing evidence that the acquittee meets the criteria in Standard 7-7.4(b)(ii) or (iii).

If commitment is continued under either (b)(i) or (b)(ii), but the criteria in Standard 7-7.4(c) governing conditional release are met, the acquittee should be placed on conditional release.

Legal assistance should be regularly available to all specially committed acquittees at the location of their confinement. To ensure that each acquittee’s right to periodic review as set forth in paragraph (a) of this Standard is effective, each acquittee should have ready access to counsel, including appointed counsel. When the acquittee is entitled to periodic review, counsel should request a hearing on the acquittee’s continuing need for commitment or should notify the court in writing that counsel has conferred with the acquittee and that a hearing is not requested at that time. By declining to request a hearing when the acquittee is entitled to review, the acquittee does not waive the right to any subsequent hearing.

Nothing in this Standard should be interpreted as limiting the right of a specially committed acquittee to petition for a writ of habeas corpus at any time.

Standard 7-7.9. Special commitment; petition for acquittee’s release

When the director of the facility in which a specially committed acquittee is confined determines that substantial clinical evidence indicates that the acquittee meets the criteria for release without conditions or, pursuant to Standard 7-7.12, with conditions, the director should petition the court for the acquittee’s release.

The petitioner should have access to counsel for preparing and presenting the petition to the court.

The petition should set forth the clinical findings supporting the conclusion in favor of release and should contain a summary of all pertinent clinical data.

A hearing should be held no later than [fifteen] days after filing the petition and the acquittee should remain confined pending the hearing.
(e) Following the hearing the court should determine the matter pursuant to Standard 7-7.8(b).

(f) The acquittee should receive a copy of the petition and should have the right to be present at the hearing, to be represented by counsel, and to present evidence.

(g) The prosecuting attorney should receive a copy of the petition and should have the right to be present at the hearing and to present evidence.

**Standard 7-7.10. Special commitment; notification of release**

When the release or conditional release of a specially committed acquittee is imminent, the prosecuting attorney should have the authority to notify relevant individuals and agencies.

**Standard 7-7.11. Special commitment; authorized leave**

(a) Authorized leave means a temporary, finite absence from the facility without staff supervision that is part of a treatment program. Authorized leave for specially committed acquittees should be permitted only by an order from court.

(b) When the director of the facility concludes that a specially committed acquittee can be granted authorized leave without posing a danger to the community and that such leave would benefit the acquittee’s treatment regimen, the director should provide notice of an intent to authorize the leave to the prosecutor and, if the acquittee is represented, to defense counsel. The notice should indicate the leave’s specific conditions and include a summary of all pertinent clinical data. The prosecutor should have the right to challenge the leave authorization in court, which should determine whether the leave is consistent with public safety and whether any additional conditions should be imposed.

(c) If a specially committed acquittee violates any condition of an authorized leave order, or if the leave is no longer appropriate to the acquittee’s treatment regimen or is no longer consistent with public safety, the leave may be terminated by the director or by the court.

**Standard 7-7.12 Special commitment; conditional release**

(a) Every state should establish procedures for the conditional release of acquittees who can be served in the community without undue risk to public safety. To facilitate conditional release, states should establish conditional release programs (CRP) with sufficient staffing and resources to discharge the following responsibilities:
Reviewing any proposed plan for conditional release and contacting all service providers named in the plan to determine their capacity and willingness to (a) provide the services specified in the plan, (b) submit periodic reports to the CRP regarding the acquittee’s participation in services, and (c) immediately notify the CRP if an acquittee is non-compliant with or otherwise no longer appropriate for services from the provider;

Monitoring an acquittee’s compliance with the conditional release order by reviewing reports provided by service providers named in the order and maintaining accessibility to providers 24 hours per day, 7 days per week, to receive reports of non-compliance;

Immediately notifying the prosecutor of any allegation or other indication that the acquittee has failed to comply with the conditions of a conditional release order or no longer is appropriate for conditional release;

Before an acquittee’s term of conditional release expires, arranging for providers serving the acquittee to assess the acquittee’s likelihood of continuing to receive necessary services without a conditional release order in place and reporting the same to the court and the attorneys for the acquittee and the state; and

Organizing periodic training for service providers in the jurisdiction regarding the special service needs of individuals on conditional release and the procedures for reporting to the CRP.

Prior to the first periodic review provided for in (a), for any person who is committed to a mental health facility, the facility, the CRP or both together should, in cooperation with local mental health providers, prepare a conditional release plan or explain in writing why release planning is not appropriate. The acquittee may also proffer a conditional release plan during any special commitment or review hearing. Every conditional release plan should specify, at a minimum:

Where the acquittee will reside;

The names and contact information for all providers who will serve the acquittee, the frequency of services, and the non-confidential nature of services;

The acquittee’s daytime activities; and

The requirements for drug testing, if applicable.
Conditional release plans should take effect only if approved by the court. Every conditional release order issued by the court should specify, at a minimum:

(i) A plan for services and other conditions of the acquittee’s release;

(ii) The responsibilities of the CRP staff, consistent with section (a)(ii-iv) of this Standard; and

(iii) The duration of the order.

If the CRP receives a report alleging that, or otherwise has reason to believe that, an acquittee has failed to comply with the conditions of release or otherwise no longer meets eligibility criteria for conditional release, it should immediately notify the prosecutor. In addition, if the CRP believes that the acquittee requires placement in an inpatient facility without delay, it should initiate proceedings for the acquittee’s civil commitment under the jurisdiction’s general civil commitment law.

If a prosecutor receives a report under section (d) of this Standard, he or she may petition the court for revocation of the acquittee’s conditional release and an order for placement of the acquittee in a facility pending a revocation hearing.

If a court finds probable cause to believe that an acquittee on conditional release has failed to comply with the conditions of release or otherwise no longer meets eligibility criteria for conditional release, it should order the acquittee taken into custody, which can include removing the acquittee from a civil hospital to which he or she was committed under (d), and transported to the originating mental health facility or such other facility as the state mental health authority designates pending a revocation hearing.

If an acquittee on conditional release is placed in a facility under section (f) of this Standard, a court should conduct a hearing within 10 days of the acquittee’s placement. The acquittee should be entitled to the procedural protections described in Standard 7-7.5.

If, at the hearing, the prosecutor proves by clear and convincing evidence that the acquittee no longer meets eligibility requirements for conditional release, the court should revoke the conditional release. Non-compliance with conditions of release may serve as evidence that the acquittee is ineligible for conditional release, but non-compliance alone is not necessarily sufficient.
If the court finds that the acquittee, although ineligible for conditional release under the existing plan for services, would be eligible with modifications to the plan, it may order such modifications and impose such other conditions as it determines appropriate.

An acquittee whose conditional release is revoked shall not be precluded from petitioning for release under Standard 7-7.8 or from being released pursuant to Standard 7-7.9.

Before the expiration of an acquittee’s term of conditional release, the CRP should provide the court and the attorneys for the acquittee and the state with reports from providers serving the acquittee assessing the likelihood that the acquittee would continue to receive and comply with necessary services without a conditional release order. Upon the request of either attorney, or sua sponte, the court may order additional evaluations of the acquittee. If the prosecutor petitions for extension of the acquittee’s conditional release term, the court should hold a hearing with the procedural protections described in Standard 7-7.5.

If, at the hearing, the prosecutor proves, by clear and convincing evidence, that the acquittee is not likely to receive or comply with necessary services without a conditional release order, the court may extend the acquittee’s conditional release, consistent with durational limits specified in Standard 7-7.7.

If the court finds that the acquittee is likely to continue to receive necessary services without a conditional release order in place, it should deny the prosecutor’s petition for extension.
PART VIII. SENTENCING AND POST-CONVICTION IN NON-CAPITAL CASES

Standard 7-8.1. Emergency Treatment

If after conviction but prior to sentencing an offender requires emergency treatment, the criteria and procedures of Standard 7-10.3(c) should be followed.

Standard 7-8.2 Contents of Presentence Report

Consistent with Standard 18-5.4 in the Sentencing Standards, in cases involving an offender with a mental disorder, a presentence report should be prepared. The report should include:

(a) A summary of the offender’s current mental health condition and current and past treatment;

(b) A description of programs or resources, such as treatment centers, residential facilities, vocational training services, educational and rehabilitative programs, and, in particular, community-based mental health services, that would be appropriate for the offender’s condition;

(c) A description of any condition relating to the offender’s likelihood of adhering to treatment;

(d) An indication of whether assignment of a specialized probation officer or a case manager trained in monitoring offenders with mental disorder would be appropriate in the offender’s case.

(e) When considered necessary to inform the judge about any of the foregoing factors, a recommendation for a comprehensive mental health evaluation.

Standard 7-8.3 Expert Assistance in Sentencing

In discharging the duties specified in Standard 18-5.8(a) (requiring notice of an intent to controvert or supplement a presentence report) and Standard 18-5.17(a)(i) (allowing a party to present evidence at sentencing hearings) defense counsel may require the assistance of mental health professionals. Accordingly, each jurisdiction should ensure that this form of assistance is available to indigent defendants who can demonstrate that their mental condition is likely to be a significant factor at sentencing and that expert assistance is needed to evaluate that condition. This provision does not preclude the court or the prosecutor from seeking a mental health evaluation prior to sentencing.
Standard 7-8.4 Use of Pretrial Evaluation Results

Testimony of a mental health professional that is based on a competency evaluation conducted prior to trial is admissible at a sentencing hearing only in accordance with Standard 7-4.7. Testimony based on other pretrial evaluations of mental condition are admissible only if the offender puts mental condition in issue at the hearing.

Standard 7-8.5 Diminished Culpability

Consistent with Standards 18-3.2 and 18-6.3 of the Sentencing Standards, in all non-capital cases evidence of mental disorder at the time of the offense may be a mitigating factor in sentencing a convicted offender. In particular, conditions that should be considered mitigating if they existed at the time of the offense include:

(a) Significant limitations in both cognitive functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from intellectual disability, dementia, or a traumatic brain injury.

(b) Severe mental disorder, not manifested primarily simply by repeated criminal conduct or attributable solely to the acute effects of voluntary alcohol or drug use, that significantly impaired the offender’s capacity to appreciate the nature, consequences or wrongfulness of conduct, exercise rational judgment in relation to conduct, or conform conduct to the requirements of the law.

Standard 7-8.6 Sentence of Probation

(a) An offender should not be denied probation solely because the offender requires mental health treatment.

(b) If a court imposes a sentence of probation the court should, to the extent authorized by applicable law, consider the offender’s current mental condition, including the presence of mental disorder and the offender’s amenability to treatment in the community for the disorder, and the conditions that could ensure the offender’s adherence to recommended treatment.

(c) Treatment of an offender with mental disorder who is sentenced to probation should be a condition of probation if necessary to protect the safety of the offender or the public or to assure the offender’s successful integration in the community.

(d) If probation is imposed with mental health treatment as a condition of probation, the court and the department of corrections should ensure that
specialized probation officers trained in working with people with mental
disorder are assigned to the offender.

**Standard 7-8.7. Competence to proceed: noncapital sentencing**

(a) A court may not sentence a defendant who is incompetent to proceed at
time of sentence.

(i) The test for determining competence to proceed at time of sentence
should be whether the defendant has the sufficient present ability
to consult with the defendant's attorney with a reasonable degree of
rational understanding and whether the defendant has a rational as
well as factual understanding of the sentence proceedings.

(ii) If, at the time of sentencing, a good faith doubt is raised as to the
defendant's competence to proceed and the defendant’s
participation is necessary to ensure a fair sentencing proceeding,
the court has an obligation to determine the defendant's
competence and, before imposing sentence, should order a
presentence evaluation of the defendant and determine whether he
or she is competent to proceed at the time of sentence according to
the procedures set forth in part IV of these Standards.

(b) If the defendant is found incompetent to proceed at the time of sentence,
the court should order treatment to restore competence pursuant to
Standards 7-4.10 through 7-4.12 in part IV of these Standards.

(i) If the defendant is restored to competency, sentencing should
proceed.

(ii) If the defendant is found to be non-restorable, and the defendant
was convicted of an offense causing, threatening, or creating a
substantial risk of death or serious bodily harm, the court should
initiate special commitment under part VII of these Standards.
Defendants convicted of other offenses may be subject to general
involuntary civil commitment.

**Standard 7-8.8. Competence to proceed: appealing from conviction in a
noncapital case**

(a) Consistent with Standard 7-5.2, the test for determining whether the
defendant is competent to make a decision regarding whether to appeal
conviction in a noncapital case should be whether the defendant has
sufficient present ability to consult with counsel with a reasonable degree
of rational understanding and whether the defendant has a rational as well as factual understanding of the nature and consequences of the decision.

(i) If the defense attorney believes the defendant is competent under this Standard, then the defense attorney should abide by the defendant’s decision about whether to appeal.

(ii) If the defense attorney believes the defendant is incompetent under this Standard then the attorney may petition the court to permit a next friend acting on the defendant’s behalf to initiate or pursue the appeal.

(b) The decision about which issues to raise on appeal is the defense attorney’s. However, incompetence of the defendant during the time of appeal should be considered adequate cause, upon a showing of prejudice, to permit the defendant to raise, in a later appeal or action for postconviction relief, any matter not raised on the initial appeal because of the defendant's incompetence.
7-9.1 Mental disorder and capital cases

(a) As stated in Standard 18-1.1 and except as provided in this Part, the American Bar Association Standards for Criminal Justice do not take a position on whether the death penalty should be an available sentencing alternative. The sole purpose of Standards 7-9.1 through 7-9.9 is to address unique issues that arise in connection with mental disorder in those jurisdictions that retain the death penalty. These issues include:

(i) When mental disorder is an exemption from imposition of the death penalty.

(ii) When mental disorder renders an offender incompetent to be executed.

(iii) The effect of mental disorder on post-conviction proceedings in capital cases.

(iv) Evaluation and judicial procedures that should be followed when mental disorder is an issue in a capital trial, at capital sentencing, or during the post-conviction process.

(b) Except as otherwise provided in this Part, procedures governing evaluations, disclosure of evaluation results, and notice of intent to present mental health experts should be consistent with Standards 7-3.2 to 7-3.14 and 7-6.4 and 7-6.5. The provisions in this Part that address those issues are designed to protect against the prosecution’s pretrial access to mental condition evidence that is relevant only after conviction.

7-9.2 Prohibition on execution of people with certain mental conditions

(a) Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and

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1 Sections (a), (b) and (c) of this provision are taken verbatim from paragraphs 1 and 2 of American Bar Association Resolution 122A, which passed the House of Delegates on August 8, 2006. The resolution was also adopted by the American Psychiatric Association, the American Psychological Association, and the National Alliance for the Mentally Ill.
practical adaptive skills, resulting from intellectual disability, dementia, or a traumatic brain injury.

(b) Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity:

(i) to appreciate the nature, consequences or wrongfulness of their conduct,

(ii) to exercise rational judgment in relation to conduct, or

(iii) to conform their conduct to the requirements of the law.

(c) A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

(d) Eligibility for exemption from the death penalty under (a) should be determined at a hearing prior to trial. Eligibility for exemption from the death penalty under (b) should be determined by the judge at the capital sentencing proceeding after the presentation of evidence but before deliberation on a verdict, unless the defense requests a pretrial hearing on the issue. The defendant should bear the burden of proving both exemptions by a preponderance of the evidence.

(e) A finding of criminal responsibility at trial should not bar a finding of eligibility for the exemption in (a) or (b), and a finding of eligibility for the death sentence under (a) or (b) should not preclude finding a mitigating circumstance at sentencing, even if the language defining the relevant criteria is identical.

7-9.3 Evaluation of mental condition relevant to capital trials

(a) The court should provide funding for one or more qualified mental health professionals to evaluate a defendant charged with capital murder if, upon motion of the defense attorney, the court finds that (i) the defendant’s mental condition is likely to be a significant factor at the guilt or penalty phase of the trial or on issues that would exempt the defendant from the death penalty, and (ii) the defendant is financially unable to pay for expert assistance. Consultative mental health professionals may be appointed consistent with Standard 7-1.3(d) upon similar findings by the court.
Mental health professionals appointed under (a) should satisfy the education, training and experience requirements specified in Standard 7-3.9 and 7-3.11(c)(ii through iv). If the attorney for the defendant establishes that there is reason to believe that the defendant may have significant limitations in both intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from intellectual disability, dementia, or a traumatic brain injury, at least one of the evaluators should be skilled in the administration, scoring and interpretation of intelligence tests and measures of adaptive behavior.

(c) Evaluators should prepare separate written reports on each of the issues addressed, including, as applicable, a mental condition defense, exemption from the death penalty based on Standard 7-9.2(a), exemption from the death penalty based on Standard 7-9.2(b), and mitigation.

7-9.4 Notice of intent to present mental health evidence

(a) If the attorney for the defendant intends to present expert evidence in support of a mental condition defense or an exemption described in Standard 7-9.2, or if the defense anticipates it will present expert mental health evidence in mitigation at the penalty phase of the trial, the attorney should so notify the prosecutor at the time of filing pretrial motions. The notice should also provide:

(i) the names of the mental health professionals who will testify;

(ii) their qualifications;

(iii) the specific nature of any testing the experts have performed or will perform; and

(iv) a brief, general summary of the topics to be addressed that is sufficient to permit the government to identify an appropriate rebuttal expert witness.

(b) If, in the event that the defendant is convicted of capital murder and the issue has not been resolved prior to trial, the attorney for the defendant decides to proceed with presentation of expert mental health evidence in support of an exemption from the death penalty under Standard 9.2(b), or
the attorney decides to present such evidence in mitigation, the attorney
should confirm his or her intent within 24 hours of the defendant’s
conviction.

(c) If the defense attorney fails to give the notice required by this Standard,
the court may impose sanctions appropriate to the degree of prejudice to
the prosecution and the willfulness of the violation.

(d) Evidence of notice given under this Standard, later withdrawn, is not
admissible in any civil or criminal proceeding against the defendant who
gave notice.

7-9.5 Discovery of defense experts’ reports and basis of evaluation

(a) Reports of experts identified under Standard 7-9.4(a) that concern a
mental condition defense or an exemption under 7-9.2(a) should be subject
to discovery by the prosecutor responsible for the guilt phase of the trial
prior to trial, consistent with Standard 7-3.7(b).

(b) Reports of experts identified under Standard 7-9.4(a) that concern an
exemption from the death penalty under Standard 7-9.2(b) or addressing
mitigation should, at the prosecutor’s discretion, be provided to either
(ii) a separate prosecutor (a “firewalled” prosecutor), who may not
share the reports or otherwise communicate about the evaluation
with the prosecutor responsible for the guilt phase of the trial
unless the defendant is found guilty of a capital offense and the
defendant confirms an intent to claim an exemption or offer
mitigation during sentencing under Standard 7-9.4(a), or
(ii) the prosecutor responsible for the sentencing phase of the trial once
the defendant is convicted of a capital offense and confirms an
intent to present mental health evidence at sentencing.

(c) As used in this Standard “reports” include not only the expert’s written
report but also educational, health care, vocational, social service,
military, and mental health records; medical and psychological test data;
notes and reports summarizing the experts' work and evaluations; and
other materials the experts consulted or relied upon.
(d) The court may impose sanctions appropriate to the degree of prejudice to
the prosecution for failure to comply with the discovery requirements of
this Standard.

7-9.6 Prosecution-initiated evaluation of the defendant and defense discovery

(a) If the defendant provides notice under Standard 7-9.4(a), the court should,
upon the prosecutor's motion, order the defendant to be evaluated by one
or more mental health professionals satisfying qualifications specified in
Standard 7-9.3(b). The scope of the evaluation should be limited to issues
that are subject of the notice.

(b) If the notice provided by the defendant under Standard 7-9.4(a) indicates
that expert evidence will be used to support a mental condition defense at
trial or an exemption under Standard 7-9.2(a), the evaluators should
submit written reports on that issue to the prosecution and the defense. If
the notice provided by the defendant under Standard 7-9.4(a) indicates that
expert evidence will or might be used in support of an exemption under 7-
9.2(b) or mitigation at sentencing, the evaluators should submit written
reports on that issue to the defense. If the evaluation takes place prior to
trial, the reports should also be submitted, at the prosecutor’s discretion,
either to

(i) the “firewalled” prosecutor described in Standard 7-9.5(b)(i), who
should not share the reports or otherwise communicate about the
evaluation with the prosecutor responsible for the guilt phase of the
trial unless the defendant is found guilty of a capital offense and
the defendant confirms an intent to offer mental health evidence
during sentencing, or

(ii) the prosecutor responsible for the sentencing phase of the trial once
the defendant is found guilty of a capital offense and confirms an
intention to offer mental health evidence during sentencing.

(c) If the defendant fails to submit to an evaluation ordered under this
Standard or fails to cooperate with the evaluation for reasons unrelated to
mental disorder the court may impose sanctions proportionate to the
degree of prejudice to the prosecution and the extent to which the failure
was influenced by the defendant’s mental disorder.

7-9.7 Inadmissibility of information obtained during an evaluation.
(a) No statement made by or information obtained from a defendant, or
evidence derived from such statement or information during the course of
any mental health evaluation, or during treatment that occurs after arrest
for the capital offense, and no opinion of a mental health professional
based on such statement, information, or evidence is admissible in the
prosecution’s case-in-chief at the sentencing phase of a capital trial for the
purpose of proving the aggravating circumstances provided by law.

(b) Such statements, information, or opinion shall be admissible for rebuttal
purposes in a capital sentencing proceeding, but only if relevant to (i) an
exemption from the death penalty, (ii) mitigation during sentencing, or
(iii) statements made by the defendant under oath where the law permits
the use of evaluation statements.

7-9.8 Competence to proceed at capital sentencing

(a) The defendant must be competent to proceed with the capital sentencing
proceeding.

(i) Absent additional information bearing on defendant's competence
at the time of capital sentencing, a finding that the defendant was
competent to proceed at trial should be sufficient to establish the
defendant's competence to proceed with sentencing.

(ii) A defendant is competent to proceed at capital sentencing if he or
she has sufficient present ability to consult with defendant's lawyer
with a reasonable degree of rational understanding and, given the
nature and complexity of the sentencing issues, has a rational as
well as factual understanding of the proceedings, including the
consequences of failing to present mitigation evidence and the
possibility that a defendant’s attitude toward the death penalty and
its alternatives will change over time.

(b) The decisions about whether to challenge the death penalty, present
mitigating evidence and present any particular mitigating evidence are
defense counsel’s, after consultation with the defendant.

7-9.9 Mental Disorder or Disability after Sentencing

2 This provision, through subsection (d), is taken verbatim from paragraph 3 of American Bar Association
Resolution 122A, which passed the House of Delegates on August 8, 2006. The resolution was also
adopted by the American Psychiatric Association, the American Psychological Association, and the
(a) **Grounds for precluding execution.** A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity:

(i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the validity of conviction or sentence;

(ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner’s participation; or

(iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner’s own case.

Procedures to be followed in each of these categories are specified in (b) through (d) below, and procedures to be followed in all three categories are specified in (e) below.

(b) **Procedure in cases involving prisoners seeking to forgo or terminate post-conviction proceedings.** If a court finds that a prisoner under sentence of death who wishes to forgo or terminate post-conviction proceedings has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision, the court should permit a next friend acting on the prisoner’s behalf to initiate or pursue available remedies to set aside the conviction or death sentence.

(c) **Procedure in cases involving prisoners unable to assist counsel in post-conviction proceedings.** If a court finds at any time that a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to [rationally] understand or communicate pertinent information, or otherwise to assist counsel, in connection with post-conviction proceedings, and that the prisoner’s participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence, the court should suspend the proceedings and order an evaluation of the prisoner. If the court finds, after evaluation or after treatment as provided in Part IV, that there is no significant
likelihood of restoring the prisoner's capacity to participate in post-
conviction proceedings in the foreseeable future, it should reduce the
prisoner's sentence to the sentence imposed in capital cases when
execution is not an option.

(d) Procedure in cases involving prisoners unable to understand the
punishment or its purpose. If, after challenges to the validity of the
conviction and death sentence have been exhausted and execution has
been scheduled, a court finds that a prisoner has a mental disorder or
disability that significantly impairs his or her capacity to [rationally]
understand the nature and purpose of the punishment, or to appreciate the
reason for its imposition in the prisoner's own case, the sentence of death
should be reduced to the sentence imposed in capital cases when execution
is not an option.

(e) Evaluation and adjudication procedure. The evaluation procedure for
making the determinations required by this Standard should be as follows:

(i) Any individual, including a correctional official, other state
official, the prosecution, counsel for the prisoner, or the court on
its own motion, may raise the issue of whether a prisoner is
incompetent on the grounds described in Standard 7-9.9(a). If the
court finds that there is reason to believe the prisoner may be
incompetent, it should appoint counsel for the prisoner if the
prisoner is not represented, and, if the prisoner is indigent, provide
counsel with adequate resources to retain a mental health
professional to evaluate the prisoner. The state should be permitted
to have its own qualified professional or professionals conduct an
evaluation as well.

(ii) All evaluations of a prisoner's current mental condition for purpose
of determining the issue of competence should be conducted by
mental health professionals whose qualifications meet the
requirements of Standard 7-3.9 through 7-3.12.

(iii) If, after receiving the reports of the evaluation or evaluations,
counsel for the prisoner believes that the prisoner is currently
incompetent, counsel should move for a hearing on the issue of
competence. Upon receiving such a motion, the court should order
a hearing unless it finds, under Standard 7-9.9 (e) (vi), that the
attorney’s motion is improper.
(iv) Following the hearing, if the court finds, by a preponderance of the evidence, that the prisoner is currently incompetent, it should order the appropriate disposition, consistent with Standards 7-9.9(b) through (d).

(v) If evaluations or proceedings under this Standard cannot be accomplished before the scheduled date of the prisoner's execution, the court should order a stay of execution until the proceedings on the issue of competence are completed.

(vi) In the absence of good faith doubt about the prisoner's current competence, it is improper for an attorney to request resources to retain a mental health professional to evaluate the prisoner or move for a hearing to determine the prisoner’s competence. It is improper to use proceedings on the issue of current mental condition solely for the purpose of delay.
PART X. SENTENCED PRISONERS WITH MENTAL DISORDER

Standard 7-10.1 Services for people with mental disorder

(a) Pursuant to Standards 23-6.11 and 23-8.2 in the Standards on Treatment of Prisoners, a correctional facility should provide appropriate and individualized mental health treatment to prisoners with mental disorder.

(b) Correctional officers should receive appropriate training on how to deal with prisoners who have a mental disorder.

(c) Segregated housing of persons with mental disorder should only occur under the circumstances defined in Standard 23-2.8.

(d) Prisoners who require mental health treatment not available in the correctional facility should be transferred to a forensic mental health facility, pursuant to procedures set forth in the following Standards.

Standard 7-10.2. Voluntary transfer to mental health facility

(a) A prisoner desiring treatment in a mental health facility may make an application for voluntary admission to such a facility.

(b) If the application is endorsed by the chief executive officer of the correctional institution and accompanied by the report of an evaluation conducted by a mental health professional that explains why the prisoner should be transferred to a mental health facility, and the mental health facility accepts the endorsed application, the prisoner should be admitted to the facility.

(c) If the mental health facility does not accept the application, then the correctional facility may petition a court to order the transfer. The petition should be accompanied by the prisoner’s application and the evaluation report, all of which should also be sent to the mental health facility. The court should set the matter for a prompt hearing. If the court finds, by clear and convincing evidence, that the prisoner has a mental disorder and is in need of treatment for the disorder in a mental health facility, the prisoner should be transferred.

Standard 7-10.3. Involuntary transfer

(a) If the prisoner disagrees with the correctional facility’s determination that transfer is needed, the facility may petition a court for involuntary transfer. The decision-maker must find by clear and convincing evidence that the prisoner has a mental disorder and is in need of treatment for the disorder in a mental health facility rather than in the correctional facility. Expert
testimony as to whether a prisoner has a mental disorder and requires treatment in a mental health facility should be admissible.

(b) Prior to involuntary transfer of a prisoner with a mental disorder to a mental health facility, the prisoner should be afforded, at a minimum, the following procedural protections:

(i) at least [3 days] in advance of the hearing, written and effective notice of the fact that involuntary transfer is being proposed, the basis for the transfer, and the prisoner’s rights under this Standard;

(ii) decision-making by a judicial or administrative hearing officer independent of the correctional facility, or by an independent committee that does not include any correctional staff but that does include at least one qualified mental health professional, who cannot be responsible for treating or referring the prisoner for transfer;

(iii) a hearing at which the prisoner may be heard in person and, absent an individualized determination of good cause, present testimony of available witnesses, including the prisoner’s treating mental health professional, and documentary and physical evidence;

(iv) absent an individualized determination of good cause, opportunity for the prisoner to confront and cross-examine witnesses or, if good cause to limit such confrontation is found, to propound questions to be relayed to the witnesses;

(v) an interpreter, if necessary for the prisoner to understand or participate in the proceedings;

(vi) counsel, or some other advocate with appropriate mental health care training;

(vii) a written statement setting forth in detail the evidence relied on and the reasons for a decision to transfer;

(viii) an opportunity for the prisoner to appeal to a mental health care review panel or to a judicial officer; and

(ix) a de novo hearing held every [6 months], with the same procedural protections as here provided, to decide if involuntary placement in the mental health facility remains necessary.

(c) If a mental health professional at the correctional facility concludes that a prisoner with mental disorder requires immediate transfer to a dedicated mental health facility because of a serious and imminent risk to the safety of the prisoner or others, the chief executive of a correctional facility

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should be authorized to order such a transfer. However, with 48 hours of admission an involuntary transfer hearing should be conducted pursuant to this Standard.

Standard 7-10.4. Right of prisoner to refuse treatment

(a) Involuntary medication of a prisoner should be permitted only if the prisoner is suffering from a serious mental disorder, non-treatment poses a significant risk of serious harm to the prisoner or others, the treatment is medically appropriate, and no less intrusive alternative is reasonably available.

(b) Prior to involuntary mental health treatment of a prisoner with a mental disorder, the prisoner should be afforded, at a minimum, the procedural protections specified in Standard 10.3(b) for involuntary mental health transfers, except that:

(i) the decision-making body in the first instance and on appeal may include appropriate correctional agency staff;

(ii) the notice should set forth the mental health staff’s diagnosis and basis for the proposed treatment, a description of the proposed treatment, including, where relevant, the medication name and dosage, and the less-intrusive alternatives considered and rejected; and

(iii) the de novo hearing should determine whether to continue or modify any involuntary treatment, and in reaching that decision should consider, in addition to other relevant evidence, evidence of side effects.

(c) In an emergency situation requiring the immediate involuntary medication of a prisoner with mental disorder, an exception to the procedural requirements described in subdivision (b) of this Standard should be permitted, provided that the medication is administered by a qualified health care professional and that it is discontinued within 72 hours unless the requirements in subdivision (b) of this Standard are met.

(d) Notwithstanding a finding pursuant to subdivision (b) of this Standard that involuntary treatment is appropriate, mental health staff should continue attempting to elicit the prisoner’s consent to treatment.

Standard 7-10.5. Good time credits and parole

(a) A prisoner transferred to a mental health facility should earn good time credits on the same terms as prisoners in adult correctional facilities.
(b) A prisoner transferred to a mental health facility should be eligible for parole release consideration on the same terms as prisoners in correctional facilities.

(c) If otherwise qualified for parole, a prisoner should not be denied parole solely because the prisoner had or is receiving treatment in a mental health facility.

(d) Parole may be conditioned outpatient treatment if the prisoner would benefit from such treatment and it treatment is necessary to protect the safety of the offender or the public or to assure the offender’s successful integration in the community parole may be conditioned on such treatment.

Standard 7-10.6. Return to correctional facility

(a) When a transferred prisoner seeks return to a correctional facility and the prisoner was transferred voluntarily under Standard 7-10.2, the prisoner should be returned to the correctional facility unless the mental health facility believes that the prisoner still meets transfer criteria and it is determined, pursuant to a hearing conducted under Standard 7-10.3(b), that continued treatment in the mental health facility is necessary. If the prisoner seeking return to the correctional facility was transferred involuntarily, the prisoner is entitled to a hearing within [six months], consistent with Standard 7-10.3(b)(ix).

(b) When the mental health facility determines that the prisoner no longer meets the transfer criteria and decides to return the prisoner, the prisoner, the correctional facility, and the court should receive written notice of this decision at least [fifteen] days prior to the return. The notice should include the factual basis for the return decision and confirmation that the prisoner has been advised of the right to object.

(i) When the prisoner, the mental health facility, and the correctional facility agree that the prisoner no longer meets the transfer criteria in Standard 7-10.3(a), the prisoner should be returned promptly to the correctional facility.

(ii) If the prisoner objects to being returned, that objection must be included in the notice sent to the court. The court should determine, at a hearing if necessary, whether the return decision reflects deliberate indifference to the offender’s reasonable mental health needs. If the court so finds, the prisoner should remain in the mental health treatment facility.
Standard 7-10.7. Civil commitment at expiration of sentence

(a) A prisoner who has been hospitalized pursuant to Standard 7-10.3 must either be released or civilly committed pursuant to the state's general civil commitment statute when the sentence expires.

(b) Statutes that provide for post-sentence commitment of offenders using criteria that differ from the general civil commitment criteria should be repealed.

Standard 7-10.8 Re-entry

Provisions for ensuring a smooth transition to the community for prisoners with mental disorder are found in Standard 23-8.9 of the Standards on Treatment of Prisoners, which govern re-entry of prisoners.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Criminal Justice Section recommends that the ABA adopt the black letter standards, dated August 2016, to chapter seven “Mental Health” of the *American Bar Association Standards for Criminal Justice*.

2. Summary of the Issue that the Resolution Addresses

Since these chapters were last amended, there have been dramatic developments in the area of legal ethics, criminal justice and mental health. Thousands of new judicial decisions have been handed down. Hundreds of new books and articles touching upon the ethics of our profession have been published. Indeed, the proper role and function of lawyers, criminal justice and mental health has been a particularly topical focus of discussion, debate and controversy in recent years.

3. Please Explain How the Proposed Policy Position will address the issue

It has been over 30 years since the third edition of the Criminal Justice Mental Health Standards was passed by the ABA House of Delegates. In that time there have been many changes in the intersection of the criminal justice system and the mental health system. These updated Standards reflect these changes and create best practices in consideration of those changes. In addition to several new Standards, every Standard has been revised since the previous edition.

The Fourth Edition of the Standards substantively revises all of the Standards in the previous edition. While there are too many changes to list here, you can find a copy of the Third Edition Standards at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/mental_health_complete.authcheckdam.pdf.

The Criminal Justice Section urges prompt consideration of the proposed Standards by the House due to the ABA’s continuing obligation to see to it that the ABA Standards for Criminal Justice reflect current developments in the law.

4. Summary of Minority Views

None are known.
RESOLUTION

RESOLVED, That the American Bar Association supports the treatment of the likelihood-of-confusion standard in federal trademark law as a question of fact.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution calls for the Association to adopt policy supporting the treatment of the likelihood-of-confusion standard as a question of fact.

2. Summary of the Issue that the Resolution Addresses

Although likelihood of confusion is a fact-intensive inquiry and determined from the perspective of an ordinary person or community would make an assessment to resolve such fact-intensive questions, a few circuits consider likelihood of confusion a mixed question of fact and law. Those rulings are inconsistent with the principle that inferences to be drawn by a reasonable person should be left to a jury.

3. Please Explain How the Proposed Policy Position will Address the Issue

The resolution will enable the American Bar Association to file a brief with the Supreme Court to encourage it to hold that the likelihood of confusion test is a question of fact and to bring consistency to the standard applied to this issue in all of the regional circuits.

4. Summary of Minority Views

None known at this time.
RESOLVED, That the American Bar Association supports an interpretation of the federal Lanham Act, 15 U.S.C. § 1051 et seq., recognizing that the ineligibility of an otherwise valid mark for registration with the U.S. Patent and Trademark Office (“USPTO”), through the cancellation of an existing federal registration or the denial of an application for a federal registration, does not in and of itself disqualify that mark for protection under all provisions of the Lanham Act, the common law, or from registration on state registers; and

FURTHER RESOLVED, That the American Bar Association supports an interpretation of the Lanham Act recognizing that the ineligibility of a mark for registration with the USPTO does not in and of itself restrict the mark owner’s right to use the mark in commerce; and

FURTHER RESOLVED, That the American Bar Association supports an interpretation of the Lanham Act recognizing that the owners of marks registered on the Principal Register, the primary register of trademarks maintained by the USPTO, enjoy procedural and substantive advantages in litigation to protect their marks otherwise not available to owners of common-law marks not registered on the Principal Register.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution will establish policy on three basic propositions of federal trademark law.

2. Summary of the Issue that the Resolution Addresses

The Resolution addresses the significance of the cancellation of an existing registration of an otherwise valid trademark or service mark on the Principal Register of the United States Patent and Trademark Office (“USPTO”), or the USPTO’s denial of an application for such a registration.

3. Please Explain How the Proposed Policy Position will Address the Issue

The Resolution will establish policy in support of advising the Supreme Court and lower courts of three basic propositions of trademark law, namely, that: (1) a determination that a mark is ineligible for registration on the USPTO’s Principal Register does not necessarily render that mark invalid and unprotectable (although it may); (2) such a determination does not restrict the mark owner’s right to use the mark in commerce; and (3) the owner of a mark registered on the Principal Register enjoys certain substantive and procedural advantages in litigation to protect its mark that are not available to the owners of unregistered marks.

4. Summary of Minority Views

The Resolution has three parts. To the best of the Section of Intellectual Property Law’s knowledge, there are no judicial opinions or scholarship inconsistent with the positions advanced by the second and third portions of the Resolution.

The Section of Intellectual Property Law has considered the following minority views expressed by some scholars and commentators and concluded they are inconsistent with the weight of authority set forth above.

As to the first portion of the Resolution, there is a minority position on the enforceability of rights to otherwise valid marks that are, for whatever reason, ineligible for registration. Some scholars and others have argued that the enforceability of a mark for which registration has been cancelled on disparagement grounds is an open question, and disagree as to how courts are likely to resolve it. See, e.g., Stephen R. Baird, “Moral Intervention In The Trademark Arena: Banning The Registration Of Scandalous And Immoral Trademarks,” 83 Trademark Rep. 661, 789-91 (1993); see also Jordan Weissmann, “Why Washington’s NFL Team Might Not Need to Worry About Losing Its Trademarks,” Slate, Jun. 18, 2014, http://www.slate.com/blogs/moneybox/2014/06/18/washington_football_team_loses_trademark_case_why_it_might_not_matter.html (last visited Oct 16, 2014); Joseph Stromberg, “The Redskins just lost some legal protection of
RESOLVED, That the American Bar Association supports an interpretation of the special patent venue statute, 28 U.S.C. § 1400(b), that does not adopt the definition of “resides” in the separate, general venue statute, 28 U.S.C. § 1391(c), to ascertain the meaning of “resides” in §1400(b); and

FURTHER RESOLVED, That the American Bar Association supports an interpretation of 28 U.S.C. § 1400(b) such that venue in a patent infringement case involving a business entity defendant is proper only in a judicial district (1) located in the state under whose laws the business entity was formed or (2) where the business entity has committed acts of infringement and has a regular and established place of business.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution asks the ABA House of Delegates to approve policy supporting a statutory construction of the special patent venue statute, 28 U.S.C. § 1400(b), that does not look to the separate general venue statute, 28 U.S.C. § 1391(c), to ascertain the meaning of the term “resides,” and limits venue for a corporate defendant to either where it resides or where it has committed acts of infringement and has a regular and established place of business, putting an end to improper forum shopping in patent cases.

2. Summary of the Issue that the Resolution Addresses

In an April 2016 decision, the Court of Appeals for Federal Circuit did not followed Supreme Court precedent. The Federal Circuit’s current reading of the patent venue statute produces the result that corporate defendants may be sued anywhere they are subject to a district court’s personal jurisdiction, which has led to forum shopping, with a high number of plaintiffs favoring venue in the Eastern District of Texas.

3. Please Explain How the Proposed Policy Position will Address the Issue

The resolution will support an American Bar Association amicus brief encouraging the Supreme Court to again hold that §1400 stands alone, and consequently the term “resides” as used in § 1400(b) means where the business is incorporated, and overturn the Federal Circuit precedent that venue is proper wherever the defendant is subject to personal jurisdiction for that case.

4. Summary of Minority Views

Some argue that the Federal Circuit’s interpretation of the current version of the two statutes is correct. They agree the patent venue statute, § 1400(b), provides that venue is proper where the defendant resides and does not define corporate residence. They favor an interpretation of §1400(b) that incorporates the general venue statute definition of corporate residency as necessary to fill a gap in § 1400(b). They see the title of § 1391(c) “Residency.—For all venue purposes, as dictating residency for corporations under § 1400(b). Some also argue that the Supreme Court’s Fourco decision goes too far by shielding corporate infringers from venue in jurisdictions in which they are infringing patents. And they agree with the Federal Circuit that subsequent amendments to § 1391 render Fourco inapplicable.
RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck through):

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) harass or discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.
Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Paragraph (g) does not prohibit conduct undertaken to promote diversity.

[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation. A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer’s practice or by limiting the lawyer’s practice
to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. See Rule 6.2(a), (b) and (c). A lawyer’s representation of a client does not constitute an endorsement by the lawyer of the client’s views or activities. See Rule 1.2(b).

[4] [6] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] [7] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.
EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution amends Model Rule of Professional Conduct 8.4, Misconduct, to create new paragraph (g) that establishes a black letter rule prohibiting discrimination and harassment. The resolution also amends Comment [3], creates new Comments [4] and [5] to Rule 8.4 and renumbers current Comments [4] and [5].

Discriminate and harass are both defined in amended Comment [3]. Discrimination is harmful verbal or physical conduct that manifests bias or prejudice towards others because of their membership or perceived membership in one or more of the groups listed in paragraph (g). Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct towards a person who is, or is perceived to be, a member of one of the groups. Protected persons include those listed in current Comment [3] (persons discriminated on the basis of race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status) and also includes persons discriminated on the basis of ethnicity, gender identity, and marital status. This brings the Model Rules more into line with the Model Code of Judicial Conduct and the Criminal Justice Standards for the Prosecution Function and Standards for the Defense Function.

The scope of new paragraph (g) is “conduct related to the practice of law.” The resolution defines covered conduct as “representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.” Adoption of policy on the terms and conditions of lawyer employment is not foreign to the House of Delegates.

New Rule 8.4(g) includes the statement, “This Rule does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16.” ABA Model Rule of Professional Conduct 1.16(a) explains that a lawyer shall not represent a client if “the representation will result in violation of the rules of professional conduct or other law.” Examples of a representation that would violate the Rules of Professional Conduct is representing a client when the lawyer does not have the legal competence to do so (Rule 1.1) and representing a client with whom the lawyer has a conflict of interest under the Rules including Rule 1.7 (current client) and Rule 1.9 (former client).

2. Summary of the Issue that the Resolution Addresses

This Resolution is a reasonable and rational implementation of ABA’s Goal III: to eliminate bias in the justice system. The ABA has adopted anti-discrimination and anti-bias provisions in the black letter of the Model Code of Judicial Conduct and in the black letter of the Criminal Justice Standards for the Prosecution Function and the Defense Function. Twenty-three jurisdictions have already adopted anti-discrimination or anti-harassment provisions in the black letter of their ethics rules. It is time for the Association to now address bias and prejudice squarely in the black letter of the Model Rules of Professional Conduct.
3. Please Explain How the Proposed Policy Position will address the issue

In the 23 jurisdictions that have adopted a black letter rule that provides it is misconduct for a lawyer to discriminate or harass another, disciplinary agencies have investigated and successfully prosecuted lawyers for discriminatory and harassing behavior.

For example, in 2015 the Iowa Supreme Court disciplined a lawyer for sexually harassing four women clients and one female employee. In Wisconsin, the Supreme Court disciplined a district attorney for texting the victim of domestic abuse writing that he wished the victim was not a client because she was “a cool person to know.” On one day, the lawyer sent 19 text messages asking whether the victim was the “kind of girl who likes secret contact with an older married elected DA . . . the riskier the better.” One day later, the lawyer sent the victim 8 text messages telling the victim that she was pretty and beautiful and that he had a $350,000 home. The victim reported she felt that if she did not respond, the district attorney would not prosecute the domestic violence complaint.

The Minnesota Supreme Court in 2013 disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about the student’s appearance; engaged in unwelcome physical contact of a sexual nature with the student; and attempted to convince the student to recant complaints she had made to authorities about him.

The Washington Supreme Court in 2012 disciplined a lawyer, who was representing his wife and her business in dispute with employee who was Canadian. The lawyer sent two ex parte communications to the trial judge asking questions like: are you going to believe an alien or a U.S. citizen? The Indiana Supreme Court in 2005 disciplined a lawyer who represented a husband in an action for dissolution of marriage. Throughout the custody proceedings the lawyer referred to the wife being seen around town in the presence of a “black male” and that such association was placing the children in harm’s way. During a hearing, the lawyer referred to the African-American man as “the black guy” and “the black man.”

Those states are leading while the ABA has not kept pace.

This proposal is a measured response to a need for a revised Model Rule of Professional Conduct that implements the Association’s Goal III – to eliminate bias in the legal profession and the justice system.

4. Summary of Minority Views

As explained in the Report, over the past two years, SCEPR has publicly engaged in a transparent investigation to determine, first whether, and then how, the Model Rules should be amended to reflect the changes in law and practice since 1998.

In December 2015, SCEPR published a revised draft of a proposal to amend Rule 8.4(g), together with proposed new Comments to Rule 8.4. SCEPR also announced to the Association,
including on the House of Delegates listserv, that it would host a Public Hearing at the Midyear Meeting in San Diego in February 2016. Written comments were also invited.

After the comment period closed in March 2016, SCEPR made substantial and significant changes to the Resolution based on minority views submitted. Changes include:

- At the request of the ABA Section of Real Property, Trust and Estate Law, the Resolution now defines discriminate in Comment [3]; it explains that disciplinary counsel may use the substantive law of antidiscrimination and anti-harassment to guide application of paragraph (g) in Comment [3]; and provides additional guidance including a statement that lawyers who charge and collect reasonable fees do so without violating paragraph (g)’s prohibition on discrimination based on socioeconomic status in Comment [5].
- At the request of the ABA Labor and Employment Law Section, this Report now explains that the terms and conditions of employment are included within the scope of “operating or managing a law firm.” Labor and Employment Law requested that the proposal include a statement that the Rule be interpreted and implemented in accordance with Title VII case law. This Report explains why the Sponsors rejected this recommendation and the Sponsors’ position that legal ethics rules are not dependent upon or limited by statutory or common law claims.
- At the request of the ABA Business Law Section Professional Responsibility Committee, the Resolution defines “conduct related to the practice of law” in Comment [4]; it includes guidance on how lawyers may ethically limit their practice under Model Rule 1.16; and it explains that paragraph (g) does not prohibit conduct to promote diversity.

In response to the language released April 12, 2016, concerns have been expressed to the Sponsors about the following:

- That paragraph (g) should include a mens rea of “knowing.” The Report addresses this issue and explains why the Sponsors did not include a mens rea.
- That the Comment should retain the statement, “A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.” This Report addressed this issue and explains why the Sponsors did not want to mix evidentiary law with the professional responsibility rules.
- That current Comment language, “Legitimate advocacy respecting the foregoing factors does not violate paragraph (d),” should be retained. The Report addresses this issue and explains why the Sponsors did retain this sentence, as amended.
- That social activities in connection with the practice of law should be more clearly defined. The Sponsors concluded that the definition provided in the Comment is
sufficient for the variety of activities addressed. The critical common factor of such activities is their relationship to the practice of law.

- That Sponsors delete “operating and managing a law firm” from the scope of the Rule or that the Rule require a prior adjudication of discrimination or harassment by a competent tribunal. The Report addresses this issue and explains why the Sponsors determined that creating two separate spheres of conduct, one inside the law firm and one outside the law firm, was inappropriate.

- Finally, some opponents express the opinion that no black letter rule is necessary.\textsuperscript{45}

\textsuperscript{45} Not every concern raised is listed here but we have identified the significant concerns that were expressed.
AMERICAN BAR ASSOCIATION

SPECIAL COMMITTEE ON HISPANIC LEGAL RIGHTS & RESPONSIBILITIES
STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE
COALITION ON RACIAL AND ETHNIC JUSTICE
COMMISSION ON IMMIGRATION
LATIN AMERICA AND CARIBBEAN LAW INITIATIVE COUNCIL
CENTER FOR RACIAL AND ETHNIC DIVERSITY
COMMISSION ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, local and territorial law-enforcement authorities to provide a culturally, substantively and accurate translation of the Miranda warning in Spanish.
EXECUTIVE SUMMARY

1. Summary of the Resolution.

This resolution calls upon the American Bar Association (“ABA”) to urge federal, state, territorial and local law enforcement authorities to provide a uniform translation of the *Miranda* warning in Spanish, one that is culturally and substantively accurately translated.

2. Summary of the Issue that the Resolution Addresses

Spanish is the most spoken language other than English in the United States. Every year there are 874,000 people stopped by police who would need *Miranda* rights read in Spanish, and another equal number of people who are bilingual but might prefer Spanish. In 2006, the Bureau of Justice Statistics reported 119,200 detainees of Hispanic origin, or approximately 15.6% of the jail population. There are many instances reported in case law that reflect mistranslations ranging from inaccuracies, ad hoc translations, and failure to use actual Spanish language. A culturally and substantively accurate translation of *Miranda* is long overdue.

3. Please Explain How the Proposed Policy Position will address the issue

The resolution will assist law enforcement personnel in administering accurate *Miranda* warnings in Spanish so the Spanish-speaking suspects can know their rights. The Spanish translation will be developed by the Hispanic Special Committee given its mission and jurisdiction statement.

4. Summary of Minority Views

None to date.
RESOLUTION

RESOLVED, That the American Bar Association urges state, local, territorial and tribal legislatures to enact laws that criminalize internet grooming tactics that target children and make them vulnerable to victimization.

FURTHER RESOLVED, That the American Bar Association encourages states to review their criminal laws and engage stakeholders to ensure that their laws governing sexual misconduct involving the internet are sufficient to protect children.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The resolution encourages legislatures across the country to enact legislation to criminalize grooming.

2. **Summary of the Issue that the Resolution Addresses**

   "Grooming" is a tactic used by sexual predators to manipulate young people they target online to meet with them offline. Because grooming is a tactic, and is often based on behavior that is otherwise legal, no crime occurs until there is some agreement to meet or further conduct on behalf of the perpetrator. Thus, without a specific grooming statute, sexual contact will have to occur, or the victim will have to travel to meet the perpetrator, before any crime is committed. Creating a crime that criminalizes grooming as a tactic will give prosecutors an important tool to stop the conduct as soon as they are aware of it, and could allow prosecutors to stop exploitation before it occurs.

3. **Please Explain How the Proposed Policy Position will address the issue**

   The resolution addresses the issue by urging legislatures to criminalize electronic grooming. If legislatures do so, it would provide prosecutors with a new tool to prosecute child sexual predators before any sexual exploitation actually takes place.

4. **Summary of Minority Views**

   The resolution passed the ABA YLD Assembly unanimously on the consent calendar.
RESOLVED, That the American Bar Association urges state, local, territorial and tribal legislatures to abolish “offender funded” systems of probation supervised by private, for profit companies.
**EXECUTIVE SUMMARY**

1. **Summary of the Resolution**

   The purpose of the resolution is to urge states to end the current system of privatized probation. This system allows private companies to act as officers of state courts in assuming the traditionally governmental function of probation supervision, while shifting the costs to defendants, most of whom are indigent. These companies often place their direct financial interest in making a profit over the civil rights of the probationers they service.

2. **Summary of the Issue that the Resolution Addresses**

   Private probation is a concept which was developed in the late 1980s. Some local governments use it to shift administrative probation costs to criminal defendants. Over the last few years, it has received international attention, with the media comparing the system to a modern debtor’s prison. For a good overview of the issue, please see *Safe Haven No Longer: The Role of Georgia Courts and Private Probation Companies in Sustaining a De Facto Debtors’ Prison System*, 48 GA. L. REV. 227 (2013).

3. **Please Explain How the Proposed Policy Position will address the issue**

   The resolution addresses this issue by urging that state legislatures to abolish “offender funded” probation systems that have created modern-day debtors prisons.

4. **Summary of Minority Views**

   None known.
RESOLVED, That the American Bar Association urges Congress to enact legislation that requires the following when a federal agency proposes or issues a substantive rule of general applicability that incorporates by reference any portion of a standard drafted by a private organization:

(a) The agency must make the portion of the standard that the agency intends to incorporate by reference accessible, without charge, to members of the public.

(b) If the material is subject to copyright protection, the agency must obtain authorization from the copyright holder for public access to that material.

(c) The required public access must include at least online, read-only access to the incorporated portion of the standard, including availability at computer facilities in government depository libraries, but it need not include access to the incorporated material in hard-copy printed form.

(d) The legislation should provide that it will have no effect on any rights or defenses that any person may possess under the Copyright Act or other current law.

FURTHER RESOLVED, That the American Bar Association urges Congress to permanently authorize agencies subject to these provisions to enter into agreements with copyright holders to accomplish the access described above.

FURTHER RESOLVED, That the American Bar Association urges Congress to require each agency, within a specified period, to:

(a) identify all privately drafted standards and other content previously incorporated by reference into that agency’s regulations;
(b) determine whether the agency requires authorization from any copyright holder in order to provide public access to the materials as described above; and

(c) establish a reasonable plan and timeline to provide public access as described above, including taking any necessary steps (i) to obtain relevant authorizations, or (ii) to amend or repeal the regulation to eliminate the incorporation by reference.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The resolution proposes legislation that would expand public access to material that has been incorporated by reference into proposed or final federal regulations.

2. **Summary of the Issue that the Resolution Addresses**

   Thousands of binding federal regulations “incorporate by reference” material that is contained in standards drafted by private organizations. In many instances, members of the public can obtain access to such material only by visiting a reading room in Washington, D.C., or by purchasing a copy of the standard from the organization that created it. This limited access can create a cost barrier for small businesses that wish to ascertain their obligations under these regulations, as well as for citizens who wish to comment on pending regulations. The policy challenge is to ensure public access to incorporated material in a manner that acknowledges the intellectual property interests of standards development organizations and that does not unduly impair their ability and incentive to continue to produce such standards.

3. **Please Explain How the Proposed Policy Position Will Address the Issue**

   The resolution urges Congress to require that when a federal agency intends to incorporate material from an industry code into a proposed or final regulation, it must obtain authorization from the copyright holder for any portion of the incorporated material that is subject to copyright protection. The authorization must at least provide for members of the public to have access without charge to a read-only online copy of the incorporated material. Access to the online content must be available on computer facilities in depository libraries. The proposed legislation would also permanently authorize agencies to enter into agreements with copyright holders to accomplish the access requirements. Under the legislation, agencies would be expected to apply the access requirements directly to newly adopted regulations and to establish reasonable plans and timelines to bring existing regulations into conformity with the same regime.

4. **Summary of Minority Views**

   None identified.
RESOLVED, That the American Bar Association urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys; and

FURTHER RESOLVED, That the American Bar Association urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of the legal services they purchase, both currently and in the future, to diverse attorneys; and

FURTHER RESOLVED, That for purposes of this resolution, “diverse attorneys” means attorneys who are included within the ambit of Goal III of the American Bar Association.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

The resolution is not proposed to exclude any demographic, but to be more inclusive of those covered within the ambit of Goal III. To that end, the resolution urges (a) all providers of legal services, including corporations and law firms, to expand and create opportunities at all levels of responsibilities for diverse attorneys; and (b) clients to assist in the facilitation of opportunities for diverse attorneys, and direct a greater percentage of legal services they purchase, both currently and in the future, to diverse attorneys.

2. **Summary of the Issue the Resolution Addresses**

For years organizations have worked to achieve greater diversity and inclusion in the legal profession. Unfortunately, the legal profession remains the least diverse profession of all comparable professions (e.g. physicians, engineers, accountants, et al.). Well-recognized studies report very little or no progress has been made to increase diversity and inclusion in our profession. We are a proud and noble profession that can do better. It is well settled that the public, the legal profession and clients are best served when lawyers reflect the demographics of the community in which legal services are provided. Increasing economic opportunities for diverse attorneys will be highly impactful in changing the trajectory of diversity and inclusiveness in the legal profession. The economic success of diverse attorneys is an effective means by which legal service providers can attract and retain more diverse attorneys to the profession.

3. **Please Explain How the Proposed Policy Position Will Address This Issue**

The policy, through the use of various recommended tools, including a uniform survey for use by both clients and lawyers who represent them, will assist law firms, lawyers and clients in achieving greater diversity and inclusiveness in the profession, consistent with Goal III, enhancing diversity and by application, also Goal II, improving our profession.

4. **Summary of Minority Views**

N/A
RESOLVED, That the American Bar Association urges courts and other governmental entities, bar associations, non-profit organizations and entrepreneurial entities that make forms for legal services available to individuals through the Internet to provide clear and conspicuous information on how people can access a lawyer or a lawyer referral service to provide assistance with their legal matters.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   This resolution calls upon courts and other entities that provide online legal forms that are accessible by those who are self-represented to include clear and conspicuous direction on how those form users may gain access to a lawyer to provide them with assistance with their legal matters. Given the scope of self-representation and the complexity of legal matters, the resolution will enable people to have better access to the information necessary to properly complete legal forms and move forward with the resolution of their legal matters in a cost-effective manner.

2. **Summary of the Issue that the Resolution Addresses**

   Courts and other governmental entities, bar associations, non-profit organizations and entrepreneurial entities are providing online legal documents that enable self-represented people to advance their legal matters. Often the sites providing these materials do not offer users the information or resources necessary to enable them to be assured they are proceeding in a proper manner. Even when links are provided to resources such as lawyer referral services, those links are often not conspicuous, limiting the ability of users to find lawyers who would be able to assist them.

3. **Please Explain How the Proposed Policy Position will address the issue**

   Urging entities that provide online legal documents to include clear and conspicuous links to lawyers provides a pipeline to those who have doubts about their decision-making when attempting to use the forms. At the modest end, the policy enhances the convenience of those making use of the forms and expands access to affordable legal services. At an outer end, the policy will protect consumers of legal services from mistakes they may make that would undermine their efforts and lead to adverse consequences.

4. **Summary of Minority Views**

   The Section of Family Law states that it was not consulted in the development of the solutions included in this Resolution. The Section opposes the Resolution and Report in their present form and urges their withdrawal at this time. The Section believes that the Resolution and Report fail to address many issues specific to the needs of and dangers to the public in decision-making and drafting of documents with legal consequences in family law cases.
RESOLVED, That the American Bar Association urges all federal, state, territorial and local legislative bodies and governmental agencies to:

(a) adopt policies, legislation and initiatives designed to eliminate the school to prison pipeline whereby students of color, students with disabilities, LGBTQ (lesbian, gay, bisexual, transgender, questioning, or queer) students and other marginalized youth constituencies are disproportionately impacted by systemic inequities in education and over-discipline resulting in disparate school drop-out or “push-out” rates and juvenile justice system or prison interactions, i.e., school to prison;

(b) adopt laws and policies supporting legal representation for students at point of exclusion from school, including suspension and expulsion;

(c) support ongoing implicit bias training for teachers, administrators, school resource officers, police, juvenile judges, prosecutors, and lawyers and others dealing with juveniles;

(d) require data reporting relating to school discipline, including distinctions between educator discipline and law enforcement discipline to the Office of Civil Rights;

(e) support legislation that eliminates the use of suspensions, expulsions, and referrals to law enforcement for lower-level offenses; and

FURTHER RESOLVED, That the American Bar Association urges state and local prosecutors’ offices, and national and state prosecutors associations to develop screening and charging policies and statements of best practices for school referred cases to juvenile courts.
EXECUTIVE SUMMARY

1. **Summary of the Resolution**

   The resolutions urge federal, state, territorial and local legislative bodies, governmental agencies and applicable entities to adopt policies, legislation and initiatives designed to eliminate the school to prison pipeline whereby students of color, students with disabilities, LGBTQ students and other marginalized youth constituencies are disproportionately impacted by systemic inequities in education and over-discipline resulting in disparate school drop-out or “push-out” rates and juvenile justice system or prison interactions school to prison.

2. **Summary of the Issue that the Resolution Addresses**

   Due to a lack of policies, legislation and specific programs, students of color, students with disabilities, LGBT students and other groups suffer dis-proportionately from inadequacies and inequities in the education system and as a result are inappropriately and disproportionately dropped out or are pushed out of school and into situations which lead to their disproportionate involvement in the juvenile justice system and prison. These students are disproportionately trapped in the School-to-Prison Pipeline;

   Insufficient support for ongoing implicit bias training for decision makers involved in the School-to-Prison Pipeline e.g. including teachers, administrators, school resource officers, law enforcement, juvenile judges, prosecutors, and other lawyers and those dealing with the juveniles;

   A critical need to develop detailed, uniform, data reporting relating to school discipline, including distinctions between educator discipline and law enforcement discipline;

   Implementation of legislation that eliminates the use of suspensions, expulsions, and referrals to law enforcement for lower-level offenses;

   Development by state and local prosecutors’ offices and national and state prosecutors’ associations of screening and charging policies and statements of best practices for school referred cases to juvenile courts.

3. **Please Explain How the Proposed Policy Position will address the issue**

   This proposed policy position demonstrates how and what legislative bodies, governmental agencies and decision makers can do to bring about change and how to do a whole-scale dismantling of the “School-to-Prison Pipeline.”

4. **Summary of Minority Views**

   N/A.
RESOLVED, That the American Bar Association amends Principles 2(B) and 6 of the *ABA Principles for Juries and Jury Trials* as follows:

2(B) Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, *marital status*, sexual orientation, *gender identity, gender expression* or any other factor that discriminates against a cognizable group in the jurisdiction other than those set forth in A. above.

6(C) The court should:

1. Instruct the jury on implicit bias and how such bias may impact the decision making process without the juror being aware of it; and

2. Encourage the jurors to resist making decisions based on personal likes or dislikes or gut feelings.
APPENDIX

PRINCIPLE 2 – CITIZENS HAVE THE RIGHT TO PARTICIPATE IN JURY SERVICE AND THEIR SERVICE SHOULD BE FACILITATED

A. All persons should be eligible for jury service except those who:

1. Are less than eighteen years of age; or

2. Are not citizens of the United States; or

3. Are not residents of the jurisdiction in which they have been summoned to serve; or

4. Are not able to communicate in the English language and the court is unable to provide a satisfactory interpreter; or

5. Have been convicted of a felony and are in actual confinement or on probation, parole or other court supervision.

B. Eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, marital status, sexual orientation, gender identity, gender expression or any other factor that discriminates against a cognizable group in the jurisdiction other than those set forth in A. above.

PRINCIPLE 6 – COURTS SHOULD EDUCATE JURORS REGARDING THE ESSENTIAL ASPECTS OF A JURY TRIAL

A. Courts should provide orientation and preliminary information to persons called for jury service:

1. Upon initial contact prior to service;

2. Upon first appearance at the courthouse; and

3. Upon reporting to a courtroom for juror voir dire.
B. Orientation programs should be:

1. Designed to increase jurors’ understanding of the judicial system and prepare them to serve competently as jurors;

2. Presented in a uniform and efficient manner using a combination of written, oral and audiovisual materials; and

3. Presented, at least in part, by a judge.

C. The court should:

1. Instruct the jury on implicit bias and how such bias may impact the decision making process without the juror being aware of it; and

2. Encourage the jurors to resist making decisions based on personal likes or dislikes or gut feelings.

D. Throughout the course of the trial, the court should provide instructions to the jury in plain and understandable language.

1. The court should give preliminary instructions directly following empanelment of the jury that explain the jury’s role, the trial procedures including note-taking and questioning by jurors, the nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles, including the elements of the charges and claims and definitions of unfamiliar legal terms.

2. The court should advise jurors that once they have been selected to serve as jurors or alternates in a trial, they must consider only the applicable law and evidence presented in court, and must refrain from communicating about the case with anyone outside the jury room until the trial is over and the jury has reached a verdict. This instruction should explain that the ban on outside communication is broad, encompassing not only oral discussions in person or by phone, but also communications through e-mails, texts, Internet postings, blog postings, social media websites like Facebook or Twitter, and any other method for sharing information about the case with another person or gathering information about the case from another person. At the time of such instructions in civil cases, the court may inform the jurors about the permissibility of discussing the evidence among themselves as contemplated in Standard 13 F. The court should also instruct jurors that they do not themselves investigate the facts of the case, the law governing the case, or the parties, lawyers, or judges in the case. The court should explain that a juror’s duties to avoid communicating about the case outside the jury room and to refrain from independent
investigations about the case are extremely important, and that the court has the authority to impose serious punishment upon jurors who violate those duties.

3. The court should give such instructions during the course of the trial as are necessary to assist the jury in understanding the facts and law of the case being tried as described in Standard 13 D. 2.

4. Prior to deliberations, the court should give such instructions as are described in Standard 14 regarding the applicable law and the conduct of deliberations.
EXECUTIVE SUMMARY

1. Summary of the Resolution
The Resolution amends two of the 19 ABA Principles for Juries and Jury Trials previously passed by the House in 2005 and amended in 2012. The first amendment, which applies to Principle 2, amends the list of those groups which should not be excluded from jury service to include marital status, gender identity and gender expression. The second amendment, which applies to Principle 6, recommends that jurors be educated as to implicit bias and how to avoid such bias in the decision making process.

2. Summary of the Issue that the Resolution Addresses
1. The exclusion of potential jurors based on marital status, gender identity and gender expression. 2. The impact of implicit bias on the decision making process.

3. Please Explain How the Proposed Policy Position will address the issue
These amendments are needed to address critical issues that have arisen since the Principles were first drafted and last amended. The first amendment clarifies that eligibility for jury service should not be denied or limited on the basis of marital status, gender identity and gender expression, confirming that no diverse group should be excluded from access or participation in the justice system. Being able to fully participate as a juror enhances public support for and confidence in the justice system. The second amendment relays that exercising fairness and equality in the court system is of critical importance to lawyers, judges, jurors and staff. Jurors and judges must be held to an even higher standard due to the significant importance of their decisions on the lives and future of all consumers of the justice system. This amendment requests that an important educational instruction be given to juries regarding what implicit bias is and how it might affect outcomes and decisions in the courtroom.

4. Summary of Minority Views
None are known.
RESOLVED, That the Association policies set forth in Attachment 1 to Report 400A, dated August 2016, are archived and no longer considered to be current policy of the American Bar Association and shall not be expressed as such.

FURTHER RESOLVED, That policies which have been archived may be reactivated at the request of the original sponsoring entities. If the original sponsoring entities no longer exist, requests may be brought to the Secretary to be placed on a reactivation list for action by the House of Delegates. Such reactivated policies shall be considered current policy for the Association and shall be expressed as such.

FURTHER RESOLVED, That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.
26. Patent Infringement  
   Section of Intellectual Property Law  
   February 2006 (Report 303 - 06MM303) 

   RESOLVED, that the American Bar Association supports the granting of a 
   permanent injunction enjoining a patent infringer from future infringement of a 
   patent that has been adjudicated to be valid, enforceable and infringed, in 
   accordance with the principles of equity on such terms as the court deems reasonable; 

   FURTHER RESOLVED, that the Association opposes consideration of the 
   extent to which the patent owner has practiced the patented invention or has 
   licensed others to do so, except when determining whether grant of a permanent 
   injunction would adversely affect public safety, public welfare, the national 
   security, or the like. 

48. Discretionary Review by the Supreme Court  
   Judicial Division  
   August 2006 (Report 116 - 06AM116) 

   RESOLVED, That the American Bar Association urges Congress to 
   amend 28 U.S. C. §1259(3) and (4) to permit discretionary review by the 
   Supreme Court of the United States of decisions rendered by the United States 
   Court of Appeals for the Armed Forces that deny petitions for review of courts-
   martial convictions or deny extraordinary relief. 

53. Darfur Peace Accord  
   Section of Litigation  
   August 2006 (Report 120B - 06AM120B) 

   RESOLVED, That the American Bar Association urges the United States 
   Government to support the Darfur peace accord signed on May 5, 2006; and to 
   support the work of the International Criminal Court in investigating and 
   prosecuting the individuals responsible for crimes in Darfur, Sudan, the 
   humanitarian work of the United Nations in Darfur, Sudan, the peacekeeping 
   efforts of the African Union, and any eventual peacekeeping efforts of the United 
   Nations in Darfur, Sudan. 

   FURTHER RESOLVED, That the American Bar Association urges the 
   United States Congress to enact and the President of the United States to sign 
   into law legislation which would:
(1) block assets and restrict visas of any individual the President of the United States determines is complicit in, or responsible for, acts of genocide, war crimes, or crimes against humanity in Darfur, including the family members or any associates of such individual to whom assets or property of such individual was transferred on or after July 1, 2002;

(2) authorize the President of the United States to provide assistance to support the African Union Mission in Sudan;

(3) encourage the Secretary of State to designate the Janjaweed militia as a foreign terrorist organization under section 219 of the Immigration and Nationality Act; and

(4) encourage the President of the United States to appoint a Presidential Envoy for Sudan to steward efforts to implement the Comprehensive Peace Agreement for Sudan, bring stability and peace to the Darfur region, address instability elsewhere in Sudan and northern Uganda, and pursue a truly comprehensive peace throughout the region.

FURTHER RESOLVED, That the American Bar Association urges the President of the United States to take action to implement such legislation immediately upon its enactment into law.
EXECUTIVE SUMMARY

1. Summary of the Resolution

   This resolution archives Association Policies that are 10 years old or older. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA.

2. Summary of the Issue which the Recommendation Addresses

   The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association’s positions were adopted decades ago and are no longer relevant or effective.

3. An Explanation of How the Proposed Policy will Address the Issue

   The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

4. A Summary of Any Minority Views or Opposition Which Have Been Identified

   None at this time.
RESOLVED, That the Association policies adopted in 1996 which were previously considered for archiving but retained as set forth in Attachment 1 to Report 400B dated August 2016, are archived and no longer considered to be current policy of the American Bar Association and shall not be expressed as such.

FURTHER RESOLVED, That policies which have been archived may be reactivated at the request of the original sponsoring entities. If the original sponsoring entities no longer exist, requests may be brought to the Secretary to be placed on a reactivation list for action by the House of Delegates. Such reactivated policies shall be considered current policy for the Association and shall be expressed as such.

FURTHER RESOLVED, That the Board of Governors may act to reactivate policies when the House of Delegates is not in session.
Attachment 1

Policies to be Archived

12. Certification Programs
   Standing Committee on Specialization
   February, 1996

13. Judicial Retirement Plans
   Judicial Division
   February, 1996

14. Standards for Programs Providing Civil Pro Bono Legal Services toPersons of Limited Means
   Standing Committee on Pro Bono and Public Service
   February, 1996

31. Habeas Corpus Relief
   Standing Committee on Armed Forces Law
   August, 1996

37. Universal Citation System in Courts
   Section of Litigation
   August, 1996

43. Certification Programs
   Standing Committee on Specialization
   August, 1996
12. Certification Programs
   Standing Committee on Specialization
   February, 1996 Report 109

   RESOLVED, That the American Bar Association accredits the following
designated specially certification programs for lawyers: Estate Planning
Law Specialist program of the National Association of Estate Planners &
Councils of Marietta, Georgia.

13. Judicial Retirement Plans
   Standing Committee on American Judicial System
   February, 1996 Report 110

   Resolved, That the American Bar Association supports enactment of
federal legislation similar to H. R. 1314, 104th Congress, which excepts
state judicial retirement plans from the non-discrimination rules of sections
401(a)(3), 401(a)(4) and 410(b) of the Internal Revenue Code of 1986;
and

   Further Resolved, That any legislation which excepts governmental plans
generally from the non-discrimination rules of section 401(a)(3), 401(a)(4)
and 410(b) of the Internal Revenue Code of 1986 should also except state
judicial retirement plans.

14. Standards for Programs Providing Civil Pro Bono Legal Services to Persons of
Limited Means
   Standing Committee on Pro Bono and Public Service
   February, 1996 Report 111

   Resolved, That the American Bar Association adopts "Standards for
Programs Providing Civil Pro Bono Legal Services to Persons of Limited
Means," dated February 1996, including the Introduction; and

   Further Resolved, That the American Bar Association recommends
appropriate implementation of these Standards by entities providing civil
pro bono legal services to persons of limited means.

31. Habeas Corpus Relief
   Standing Committee on Armed Forces Law
   August, 1996 Report 101B

   RESOLVED, that the American Bar Association urges that military capital
prisoners be provided with the same opportunity for the assistance of
counsel in seeking federal post-conviction habeas corpus relief as is now
provided by federal law for persons sentenced to death in the civilian
courts of this country.
RESOLVED, that the American Bar Association recommends that:

1. All jurisdictions adopt a system for official citation to case reports that is equally effective for printed case reports and for case reports electronically published on computer disks or network services, that system consisting of the following key elements:

   A. The court should include the distinctive sequential decision number described in paragraph C below in each decision at the time it is made available to the public. B. The court should number the paragraphs in the decision.

   C. The court should require all case authorities to be cited by stating the year, a designator of the court, the sequential number of the decision, and where reference is to specific material within the decision, the paragraph number at which that material appears.

   D. Until electronic publications of case reports become generally available to and commonly relied upon by courts and lawyers in the jurisdiction, the court should strongly encourage parallel citations, in addition to the primary citation described in paragraph C above, to commonly used printed case reports. When a cited authority is not available in those printed case reports, the court should require counsel to provide printed copies to opposing counsel and to the court. The parallel citation should only be to the first page of the report and parallel pinpoint citations should not be required.

   E. The standard form of citation, shown for a decision in a federal court of appeals, should be: Smith v. Jones, 1996 5Cir 15, ¶18, 22F.3d 955. 1996 is the year of the decision; 5Cir refers to the United States Court of Appeals for the 5th Circuit; 15 indicates that this citation is to the 15th decision released by the court in the year; 18 is the paragraph number where the material referred to is located, and the remainder is the parallel citation to the volume and page in the printed case report where the decision may also be found.

RESOLVED, that the American Bar Association re-accredit the following designated specialty certification programs for lawyers:
Business Bankruptcy Law and Consumer Bankruptcy Law programs of the American Bankruptcy Board of Certification of Alexandria, Virginia; Business Bankruptcy and Creditors’ Rights programs of the Commercial Law League of America Academy of Commercial and Bankruptcy Law Specialists of Chicago, Illinois; and Civil Trial Advocacy and Criminal Trial Advocacy programs of the National Board of Trial Advocacy of Boston, Massachusetts.
EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution archives Association Policies adopted in 1996 which were previously considered for archiving but retained. A policy that is archived is not rescinded. It is retained for historical purposes, but cannot be expressed as a current position of the ABA.

2. Summary of the Issue Which the Resolution Addresses

The archiving project, mandated by the House of Delegates in 1996, will improve the usefulness of the catalogued Association positions on issues of public policy. Many of the Association’s positions were adopted decades ago and are no longer relevant or effective.

3. An Explanation of How the Proposed Policy will Address the Issue

The archiving project will allow the Association to pursue primary objectives by focusing on current matters. It will prevent an outdated ABA policy from being cited in an attempt to refute Association witnesses testifying on more recent policy positions.

4. A Summary of Any Minority Views or Opposition Which Have Been Identified

None at this time